Paragon Paint & Varnish Corporation *and* Local 8-406, Oil, Chemical and Atomic Workers International Union, AFL–CIO. Cases 29–CA–17710, 29–CA–17801, 29–CA–17835, 29–CA–17889, 29–CA–17926, and 29–CA–17966

May 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On November 9, 1994, Administrative Law Judge Joel B. Biblowitz issued the attached decision. The Respondent filed exceptions, a motion to reopen the record, and a supporting brief. The General Counsel filed a brief in support of the decision of the administrative law judge and a letter in opposition to the Respondent's motion to reopen the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's discrediting of the testimony of the Respondent's owner and president, Selma Rattner, we rely on the judge's assessment of her demeanor both as a witness for the Respondent and as a hostile witness for the General Counsel pursuant to Section 611(c) of the Federal Rules of Civil Procedure. We, however, do not rely on Rattner's seating herself within range of testifying witnesses, or any appearance Rattner may have given of ''staring down'' these witnesses. It is axiomatic that deference is due credibility determinations based at least partially on the judge's assessment of the demeanor of the witness. See *NLRB v. Original Oyster House*, 822 F.2d 412, 414 (3d Cir. 1987). The judge satisfied this axiom in his assessment of Rattner's veracity. Indeed, he contrasted Rattner's muted style and professed ignorance of procedures and activities at the plant when Rattner testified for the General Counsel with Rattner's seeming verbosity and freely offered explanations about incidents when Rattner testified for the Respondent. We therefore deny the Respondent's motion to reopen the record to reassess the judge's discrediting of Rattner based on Rattner's seating arrangements and appearance when she was not testifying. These factors are irrelevant to the judge's valid assessment of Rattner's credibility based on her demeanor.

The Respondent also claims that the judge was biased against Rattner. We have carefully examined the entire record, including the judge's decision, and we are convinced that the judge's conduct does not constitute even the appearance of partisanship. There is no basis for finding that bias or partiality existed merely because the judge resolved important factual conflicts arising in the proceeding in favor of the General Counsel's witnesses.

In addition, we find no merit to the Respondent's exception to the judge's crediting the testimony of employee and Assistant Shop Steward William Cerezo over Rattner's testimony concerning incidents that occurred on February 1, 1994. The Respondent argues that the judge should have granted the Respondent's motion to strike the testimony of Cerezo on the basis of the General Counsel's failure to give the Respondent all of Cerezo's affidavits prior to the Respondent's cross-examination of Cerezo. The record reveals that the affidavit at issue related to a charge that was withdrawn, not to the charges at issue in this case about which Cerezo was testifying. Nevertheless, the General Counsel gave the affidavit to the Respondent, the judge allowed the Respondent further time to cross-examine Cerezo, and the Respondent did so. In these circumstances, the judge correctly denied the Respondent's motion to strike Cerezo's testimony.

In the absence of exceptions, we adopt pro forma the judge's findings that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Juan Gonzales on February 1, 1994, and Section 8(a)(5) and (1) of the Act by failing to provide the Union with information about the Respondent's medical insurance program and the names of current employees, their job titles, and hourly pay pursuant to the Union's oral and written requests on November 29 and December 1 and 15, 1993.

Also in the absence of exceptions, we adopt pro forma the judge's dismissal of certain complaint allegations: (1) The 8(a)(5) and (1) allegations involving the Respondent's failure to remit to the Union dues

[1] We note that the judge made inadvertent errors in the Order and notice. We will correct them. We also will add a broad remedial order. The violations at issue are egregious. They include frequent discrimination against employees selected as union representatives and the unlawful layoff and subsequent unlawful lockout of, ultimately, the entire bargaining unit. Moreover, the violations continued unabated during an approximate 10-month period and the Respondent's owner and president, Selma Rattner, acted as a principal in their commission. We find that a broad remedial order is required in light of the Respondent's unrelenting opposition to the employees' exercise of their fundamental statutory rights. *Hickmott Foods*, 242 NLRB 1357 (1979).

and initiation fees deducted from employees' wages since June 1, 1993, the Respondent's refusal to permit shop stewards to attend grievance meetings on worktime on June 16 and September 22, 1993, and the Respondent's refusal to give the Union its books and financial records pursuant to union requests at the December 1 and 15, 1993 negotiating sessions; (2) the 8(a)(3) and (1) allegations involving the Respondent's warnings, 3-day suspensions, and transfer to the paint filling department given to Assistant Shop Steward Hector Aponte on June 23, July 21, and October 25, 1993; (3) the 8(a)(1) allegations involving the Respondent's closer supervision and following of Shop Steward Michael Meyers and forcing him to put his clothes in a locked room on February 1, 1994, and involving the Respondent's pulling on Assistant Shop Steward William Cerezo's jacket on February 1, 1994; and (4) the 8(a)(5), (3), and (1) allegations involving the Respondent's December 27, 1993 discharge of Yugo A. Carmona, Pedro Mercado, Miguel Alvarado, Jose Vendrell, Javier Restrepo, and Juan Serrano.

Finally, we note that the judge found that the merger election satisfied the Board's traditional due process criteria. Accordingly, we need not pass on what action the Board would take had the election not satisfied those standards. *Toyota of Berkeley*, 306 NLRB 893, 899 fn. 6 (1992).

ORDER

The National Labor Relations Board orders that the Respondent, Paragon Paint & Varnish Corporation, Long Island City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their support for the Union.

(b) Imposing more onerous and less desirable working conditions on its employees because of their union activity and because they engaged in a concerted protest and strike commencing on December 22, 1993, and other protected concerted actions.

(c) Issuing warnings to its employees because of their union activities.

(d) Imposing more onerous and less desirable working conditions on its employees because of their union activities.

(e) Discharging its employees Arias, Sossinski, and, subsequently, all but six of its employees because of union or other protected concerted activity.

(f) Suspending its employees because of union or other protected concerted activity.

(g) Forcing employees to work overtime because of union or other protected concerted activity.

(h) Requiring its employees to use the bathroom to change into and out of their work clothes because of their union or other protected concerted activity.

(i) Refusing to reinstate its employees after they made an unconditional offer to return to work on January 12, 1994.

(j) Locking out its employees on about February 1, 1994.

(k) Failing to give its attorney the required authority with which to bargain with the Union about grievances.

(l) Reducing the frequency with which it paid its employees without prior negotiations with the Union.

(m) Unilaterally refusing to grant the Union access to the facility.

(n) Failing to provide the Union with information that it requested regarding the medical insurance that it provided and the employees that it employed.

(o) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Offer Arias and Sossinski immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(b) Make whole the other employees (those who were laid off on December 22 as well as those who concertedly refused to work beginning on December 27 and were included in the unconditional offer to return to work dated January 12, 1994) for the loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Remove from its files any reference to the unlawful layoffs and terminations and notify the employees in writing that this has been done and that the unlawful layoffs and terminations will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) On request, promptly provide the Union with the information that it requested regarding the medical insurance that it provided to the employees and the costs thereof and the names, job titles, and salaries of all of the Respondent's nonsupervisory employees.

(f) On request, promptly provide the Union with access to its facility.

(g) Post at its facility in Long Island City, New York, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their support for Local 8-406, Oil, Chemical and Atomic Workers International Union, AFL–CIO or any other labor organization.

WE WILL NOT impose more onerous or less desirable working conditions on our employees in retaliation for their protected concerted activities.

WE WILL NOT issue warnings to our employees, suspend or discharge our employees, force our employees to work overtime, lock out our employees, or require our employees to use the bathroom to change into and out from their work clothes in retaliation for their union activities.

WE WILL NOT refuse to reinstate employees who made an unconditional offer to return to work.

WE WILL NOT, without prior negotiation with the Union, reduce the frequency with which we pay our employees, affect the Union's access to our facility, or require our employees to use the bathroom to change into, and out from, their work clothes.

WE WILL NOT refuse to give the Union requested information that is necessary and relevant to it as the collective-bargaining representative of our employees.

WE WILL NOT fail to give our attorney adequate authority with which to deal with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, provide the Union with the cost and type of medical insurance coverage that we provide for our employees, and with the names, job titles, and salaries of all of our nonsupervisory employees.

WE WILL, on request, allow the Union to visit our facility.

WE WILL make whole Antonio Arias and Ted Sossinski, with interest, for any loss of earnings and other benefits they suffered as a result of our discrimination against them and we will offer them immediate and full reinstatement to their former jobs or, if those jobs are no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make whole the employees that we laid off at the end of the day on December 22, 1993, as well as the employees that we refused to reinstate pursuant to their unconditional offer to return to work dated January 12, 1994, with interest, for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the above-mentioned discharges, layoffs, and refusals to reinstate, and we will notify each of these employees in writing that this has been done and that we will not use the discharges, layoffs, and refusals to reinstate, against them in any way.

PARAGON PAINT & VARNISH CORPORATION

April M. Wexler, Esq. and *Ann S. Goldwater, Esq.*, for the General Counsel.
Martin Gringer, Esq. (Franklin & Gringer), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case[1] was heard by me on June 6 and 7 and July 11 and 13, 1994, in Brooklyn, New York. The amended consolidated complaint here, which issued on March 31, 1994,[2] was based on unfair labor practice charges and amended charges that were filed by Local 8-712, Oil, Chemical and Atomic Workers International Union, AFL–CIO (the Union) on October 7, 1993,[3] November 5, 17, and 24, December 13, January 5 and 26, 1994, February 2, 1994, and April 4, 1994. The amended consolidated complaint alleges numerous violations of Section 8(a)(1), (3), and (5) of the Act by Paragon Paint & Varnish Corporation (Respondent). It is alleged that Respondent, by Selma Rattner, its president and agent, on about October 5, threatened to harass and discharge its employees because of their union activities, and on about February 1, 1994, interrogated its employees about their union activities, in violation of Section 8(a)(1) of the Act. It is also alleged that Respondent discharged Antonio Arias from on about July 7 until about July 16, issued written warnings to Michael Meyers and William Cerezo on about June 16, imposed less desirable and more onerous working conditions on Meyers, in about June or July, by assigning him to clean the fourth floor bathroom at the Long Island City facility (the facility), suspended Hector Aponte for 3 days without pay, and issued a warning notice to him, in June or July, transferred Aponte, in about July, from his position in Respondent's batch making department to its paint filling department, and discharged Arias from about August 27 to about July 18, 1994, because of their support for, or activities on behalf of, the Union in violation of Section 8(a)(3) of the Act. It is further alleged that Respondent violated Section 8(a)(3) of the Act by issuing a written warning to Aponte on about October 5, assigning Meyers to work overtime in October, suspending Aponte for 3 days without pay on about October 25, imposing less desirable and more onerous working conditions on Aponte and Meyers by assigning them to clean the second and first floor bathrooms at the facility on about October 25, and discharged Ted Sossinski in October or November. It is also alleged that Respondent violated Section 8(a)(5) of the Act by failing and refusing to bargain in good faith with the Union which, for many years, had been the collective-bargaining representative of most of its employees, in that on about June 16 and September 22 it designated its attorney to represent it at grievance meetings with the Union, but failed to authorize the attorney to bargain with the Union, settle grievances, or otherwise act on its behalf; on those same dates, prohibited Meyers and Cerezo, the shop steward and assistant shop steward, from attending grievance meetings which they had previously been allowed to do; since about June, Respondent has failed and refused to remit to the Union all union dues and initiation fees that it has deducted from the wages of its employees pursuant to valid checkoff authorizations; on about October 26, November 17, and December 1, Respondent refused to allow union representatives access to its facility, notwithstanding that its collective-bargaining agreement with the Union provides for such access; and on about October 15, it reduced the frequency with which it paid its employees from once every week to once every 2 weeks; this is also alleged to violate Section 8(a)(3) of the Act. It is also alleged that Respondent violated Section 8(a)(5) of the Act, since on about December 1, by failing to provide the Union with certain information that it requested.

It is further alleged that on about December 22, Respondent's employees concertedly protested to Respondent its failure to pay them certain wages due and, following this protest, Respondent discharged 11 named employees and refused to reinstate them until about March 8, 1994, and that from about December 27 through about February 1, 1994, certain of Respondent's employees ceased work concertedly and engaged in a strike, and that this was an unfair labor practice strike caused by some of Respondent's actions described above. It is alleged that Respondent fired six named employees on December 27 and failed to reinstate them until March 8, and that on January 11 and 12, 1994, the Union made an unconditional offer to return for the employees who ceased work concertedly on December 27, and those who were terminated on that same day, but that Respondent refused to reinstate them until about March 8, 1994. Finally, it is alleged that on about February 1, 1994, the employees on whose behalf the Union offered to return unconditionally (as described above) did return to work; however, it is alleged that on that date Respondent violated Section 8(a)(1), (3), and (5) of the Act by: imposing more onerous and less desirable working conditions on Cerezo by assigning him to be in charge of employees' work clothes and where they change their clothes, and on Cerezo and Meyers, by repeatedly requiring them to move heavy paint cans manually, without a handtruck or other equipment, for no apparent business reason; subjected Meyers to closer than normal supervision and followed him and required him to put his clothes in a locked room; directed certain of its employees to leave its facility in the middle of the workday and locked them out; and pulled Cerezo by his jacket.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation with its principal office and place of business in Long Island City, New York (the facility), has been engaged in the nonretail manufacture, distribution, and sale of paints and related products. During the year preceding the issuance of the complaint, Respondent purchased and received at its facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] As will be discussed below under ''Analysis,'' the General Counsel's motion to substitute Local 8-406 for Local 8-712 is granted.

[2] A further complaint in Case 29–CA–18275, which issued on June 3, 1994, and which was consolidated with the instant matter on that same day, was settled by the parties during the hearing here and was withdrawn and severed at that time.

[3] Unless indicated otherwise, all dates referred to herein relate to the year 1993.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

At the commencement of the hearing, the General Counsel moved to amend the consolidated amended complaint by substituting Local 8-406, Oil, Chemical and Atomic Workers International Union, AFL–CIO (Local 406) for the Union because the Union was ''amalgamated into'' Local 406. Counsel for Respondent objected to this amendment. I reserved judgment on this motion.

It is the General Counsel's position that the Union merged with Local 406, effective April 1, 1994, pursuant to an election conducted on March 8, 1994. This contention is supported by the testimony of Sarah Adams, who was the secretary treasurer for the Union, and Charles Horvath, a representative of Local 406. Adams testified that in about January 1994, the Union represented about 110 employees. Notification of the merger election to be conducted on March 8, 1994, was given to the shop stewards and to those present at prior meetings. In addition, the notice was faxed to companies under contract with the Union, but not to Respondent. This notice, with the Union's letterhead, but undated, states:

O.C.A.W.—Local 8-712

Union Meeting Notice

Date—Tuesday, March 8, 1994
Time—5:30 P.M.
Place—160 Montague Street
Brooklyn, NY

Agenda—1. Regular Monthly Business
2. Amalgamation (merger) vote into another OCAW Local will be taken.

Adams testified that there was a regular union membership meeting in February 1994, specifically for Respondent's employees, at a diner near the facility; prior notice of the meeting was given to the shop stewards and all of the employees of Respondent attended the meeting. At this meeting she spoke of the ''possible merger into Local 8-406'' and it was decided that the vote on merging with Local 406 would take place at the next union meeting on March 8, 1994. About seven union members attended the membership meeting on March 8, 1994. Notice of this meeting was sent to the shop stewards for each of the Union's shops to be posted at the shops. Michael Meyers, the shop steward at the facility, however never received it. Adams read the minutes of the prior meeting and a discussion took place about a merger with Local 406. Those present voted unanimously in favor of this merger. By letter dated March 9, 1994, Adams wrote to the president of the O.C.A.W. International union to inform him of the vote to amalgamate into Local 406. By notice to the officers of Local 406 and to the Union, dated March 23, 1994, the International president approved of the merger to be effective April 1. By letter dated March 31, Adams wrote to Respondent, as well as the other employers with whom it had contracts, that the Union had ''merged into'' Local 406. The letter concludes: ''Therefore, upon receipt of information from Local 8-406, kindly contact and forward all future correspondence regarding Local 8-712 union business to officers of merged Local 8-406.''

William Cerezo, an employee of Respondent and assistant shop steward at the facility, testified that shortly before the March 8, 1994 election, he received a telephone call from Adams saying that the election was going to take place and that he should attend. Of Respondent's employees, only he, Meyers, and Hector Aponte, another assistant shop steward at the facility, attended the meeting. Horvath testified that prior to the merger with the Union, Local 406 had approximately 1000 members. In about the late summer of 1993, he had discussions with Adams about a possible merger of the unions. In a letter dated November 1 to be posted on the bulletin board of all its shops, Horvath notified the Local 406 members of a regular monthly meeting to be held on November 16, at which one of the items to be discussed was an amalgamation with the Union. About 12 to 15 members attended the meeting, and a motion to accept an amalgamation with the Union was passed unanimously. After the Union voted to approve the amalgamation, Horvath wrote to the International, by letter dated March 10, requesting approval of the merger. As stated above, the International approved on March 23, 1994. The parties stipulated that since that time, Respondent has been remitting dues to Local 406 and has been making contributions to the International's pension fund, and that Rattner has met with representatives of Local 406.

The Union had represented Respondent's production employees at the facility for approximately 20 years. The most recent contract between the parties is for the period December 1, 1991, through November 30, 1994. This contract contains a union-security clause and checkoff provision, providing that the Respondent shall deduct union dues and initiation fees from the members' wages and shall remit these amounts to the Union, as well as a grievance-and-arbitration clause. It is alleged that Respondent violated Section 8(a)(1), (3), and (5) of the Act by committing certain acts during scheduled grievance meetings and thereafter on June 16 and September 22. It is alleged that on those dates Respondent designated its attorney as its agent to represent it at the grievance meetings with the Union, but failed to authorize him to bargain with the Union over the grievances or to settle the grievances and, on these dates, prohibited Michael Meyers and Cerezo, the shop steward and assistant shop steward, from attending these meetings, notwithstanding the contract between the parties and the past practice of permitting shop stewards and assistant shop stewards to attend bargaining sessions and grievance meetings during working time and, on about June 16, issued written warnings to Meyers and Cerezo for attempting to attend the grievance meeting held at the facility that day.

Adams whose testimony, while fairly credible and believable, was not a model of clarity, was one of those present on behalf of the Union at these grievance meetings. The meeting of June 16 was scheduled to attempt to settle some pending grievances. It took place in a room on the second floor at the facility. Attending were Adams, Union Attorney Vito Mundo, Respondent Attorney Stephen Bermas, and Respondent's plant manager, Michael Murray. Adams testified that while she and Mundo were waiting for the meeting to begin, Meyers and Cerezo came into the room and ''then

they were being paged to return to work and then they paged Steve Bermas to send them back to work.'' They never attended the meeting. At this meeting Bermas told them that he had no authority to make any decisions; all decisions were made by Rattner. When issues were discussed, Bermas walked out, spoke to Rattner, and reported her position on the grievance. As best as she could recollect, no grievances were settled with Bermas at this meeting. Adams could not remember how many times she had previously been at the facility prior to June, but on those occasions she was there with the then union president, Murray, who ceased working for Respondent on January 10, 1994, and testified as a witness for the General Counsel, testified that on that day ''we interpreted that we really were not obligated to have them [Meyers and Cerezo] leave their work area.'' Because they came to the grievance meeting, he issued them a written warning on the instructions of Rattner. He testified that, in the past, the Union's representatives were allowed to meet with the shop steward for brief periods to discuss grievances as long as it did not interfere with production, and the shop committee was allowed to attend ''grievance meetings.'' He testified further that at these meetings, Bermas told the Union that he didn't have the authority to resolve the grievances, that he had to check with Rattner, and he did not resolve any grievances on his own.

Mundo, whose law firm was retained by the Union to represent them for problems that they were having with Respondent, testified that he was present in the second floor room at the facility on June 16 for a grievance meeting. The purpose of the meeting was to attempt to resolve eight items for which the Union had issued demands for arbitration. When he and Adams arrived at the room, Meyers and Cerezo were already there, but Murray and Bermas told them that they had to return to their workplace, and they left. He wanted Meyers and Cerezo at the meeting because they knew best what was occurring at the facility, but they left as requested. Shortly after Meyers and Cerezo left the room, he heard Rattner yelling: ''I'll fire them all before I do anything. They'll all be gone.'' When they began discussing the grievances Bermas agreed with the Union on most of the grievances, but he said that he had to go out to discuss the issues with Rattner:

> He went out for several minutes, came back maybe five minutes later and said well, I'm sorry, my view doesn't count, Ms. Rattner is a tough woman and she does things her way. Whether or not I think you have a point or not doesn't matter here, Ms. Rattner said that she wouldn't agree to any of these items to be resolved.

Mundo asked why they were meeting if only Rattner had the authority to make the decisions, and Bermas said that he didn't have the authority and that he could only say what he was told, and that he had to go back to Rattner to ask her whether or not he could do something, ''and if she says no, she says no. My opinion doesn't count.'' On one of the occasions that Bermas left the room, he returned with Rattner. After discussing how she became involved in the business when he husband retired, she proposed: ''If you drop all the grievances, then let's try to work forward from here, let's drop everything that's pending now.'' Mundo said that the Union would be happy to work with her, but they could not drop all the pending grievances. Rattner became upset and began yelling that the Union was going to put her out of business and she left the room. Nothing was resolved at that meeting.

Cerezo testified that he was asked (presumably by the Union) to attend this grievance meeting. As he got to the room where the meeting was being held, Murray told him to return to his work station, which he did. Shortly thereafter, Murray gave him a written warning for not being at his work station when he should have been there. Cerezo asked Murray why he wasn't allowed to attend the grievance meeting, and Murray told him that Rattner didn't want him in the meeting during worktime. The warning that Cerezo received that day states that he was in the coffeeroom (where the grievance meeting took place) rather than at his work station. He testified that when he told Murray that he was not in the coffeeroom, Murray said: ''I wrote down what I was supposed to write down. She wants to write you up for it, she's writing you up for it.'' Meyers, who had been shop steward at the facility for 3 or 4 years, testified that on the evening Adams called him and told him that there would be a grievance meeting in a room at the facility and asked him to attend. He had never previously attended a grievance meeting. On the day in question, before he and Cerezo could get into the room, Murray told them that Rattner said that they were not allowed to be in the meeting and that they should return to their work stations. Later that day, Murray gave him a written warning identical to Cerezo's warning.

Rattner was called as an 611(c) witness by the General Counsel at which time she was asked about this June 16 grievance meeting, among other subjects. She was asked:

> Q. Directing your attention to June 16, 1993, isn't it true that there was a meeting with the union that day to discuss grievances?
>
> A. I don't recall.
>
> Q. Do you recall attending a meeting with the union or having a meeting scheduled with the union in June?
>
> A. what was the date?
>
> Q. June 16, 1993.
>
> A. I don't recall.

Rattner then answered two questions fairly candidly:

> Q. Isn't it true that prior to June 16, 1993, the shop committee attended grievance meetings and bargaining sessions?
>
> A. They were asked to attend.
>
> Q. Isn't it true that they attended those meetings?
>
> A. Not always.

Rattner then returned to her prior attitude and position:

> Q. Isn't it true that these sessions were held during the work day, prior to June 16, 1993?
>
> A. I don't recall.
>
> Q. Isn't it true that they were held at 10 a.m. in the morning prior to June 16, 1993?
>
> A. I don't recall.
>
> Q. Did you attend those meetings, when they would have grievance sessions?
>
> A. Not necessarily.
>
> Q. Isn't it true that you had Michael Murray issue written warnings to both Meyers and Cerezo because

they attempted to attend the union meeting on June 16, 1993?

A. I would doubt that.

Q. Isn't it true that written warnings were issued to both Meyers and Cerezo on June 16, 1993?

A. I don't recall.

Rattner's attitude and memory improved substantially about a month later when she was questioned about this incident by her counsel. At that time, she testified that at about 10 a.m. on June 16 she saw Meyers and Cerezo outside the coffeeroom, where the grievance meeting was to take place. Because that area was ''only for authorized personnel and not for the factory employees'' she told them that they had no business being there; ''they mumbled something about Union, you know, meeting, but that was it.'' A grievance meeting was scheduled to take place in that room at 11:30 that morning, but nobody was in the room at the time. She told Murray that they were there. She testified that she was aware that Meyers and Cerezo were going to participate in the grievance meeting. She further testified that in the prior 10 years there had never been a grievance meeting at the facility.

Bermas testified that the June 16 grievance meeting was the first grievance meeting that he attended for Respondent. At either that session, or the grievance meeting on September 22, to be discussed more fully below, Mundo accused him of not being in good faith because he did not have authority to negotiate with him on the grievances. Bermas responded that was ''nonsense . . . I had a client, I was the attorney, not the client, and any type of agreement that he and I came to, of course, was subject to the approval of the client and in this case, really meant Mrs. Rattner.'' He testified that during the grievance meetings of June 16 and September 22, there were some grievances that he was aware of prior to the meetings and some that he didn't know of until after the meetings began. As to the former, ''I knew on some grievances going in to the meetings how far I could go and with those I didn't have to go back, but it is only because I already had her [Rattner] approval.'' He testified further: ''But . . . if we got in to new areas that I couldn't have expected, so I couldn't have gotten . . . the parameters of my authority beforehand, then yes, I would have to go back to Ms. Rattner to have it approved.'' He never told Mundo that he agreed with him on his grievances, but lacked the authority to resolve anything.

The next grievance meeting took place at the facility on September 22 at 4 p.m. Adams and Frank Melton, an International representative attended for the Union; again, Bermas and Murray attended for the Respondent. Adams testified that she asked to have Meyers and Cerezo join the meeting, but Rattner said that they would not be allowed to do so until 4:20 p.m., when their workday was completed, but they never did come to the meeting. Adams and Melton remained until about 4:30 p.m.; they discussed grievances with Bermas and Murray, but Bermas left the room and returned, saying that he had no authority to do anything about the grievances and none were settled at this meeting. Melton testified that prior to September 22, he had a number of conversations with Rattner where it was agreed that the grievance meeting would take place on September 22 at 4 p.m. Melton told her that he wanted his grievance committee to be present, and she told him that Bermas and Murray would be present for Respondent. He said that he had no objection to that. He and Adams arrived at the facility that afternoon and were taken to the conference room at 4 p.m.; Bermas was present, but Murray, Meyers, and Cerezo were not. When Melton asked Bermas where they were, he said that Murray was busy and the grievance committee members were loading a truck. Bermas also told them that he didn't know anything about the grievances and was not prepared to discuss them. Bermas left the room to speak to Rattner, and when he returned Melton again asked him where Murray and his committee were. Bermas said that he didn't know where they were. Melton asked about the grievances and Bermas said that he didn't know anything about the grievances that he was talking about. Melton said that since his committee and Murray were not there, and Bermas didn't know about the grievances, that they were leaving and, at about 4:30 p.m., they left. Meyers testified that he knew ahead of time that Melton and Adams would be at the facility on September 22 at 4 p.m. for a grievance meeting. At about 3:55 p.m. that day, Murray told him that they could not leave work to attend the meeting until 4:20 p.m. At about 4:20 p.m. they went to the conference room, but everybody had left by then.

The complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act by assigning Meyers to clean the bathroom at the facility in about June, and by assigning Meyers and Aponte to clean the bathroom in about October. Meyers testified that in about June or July, Rattner told him to come to her office because someone had filed a complaint with OSHA and a woman from OSHA was there to inspect the facility. At Rattner's request, Meyers showed the woman around the facility. After this woman left, Murray told him that he had to clean the fourth floor bathroom. He had never done this work before and it had previously been performed by ''Nicky,'' who cleaned the bathrooms as part of his job and was still working at the facility. Murray testified that Meyers had submitted some grievances about the bathrooms and Rattner told him to assign Meyers to clean the bathrooms—''to solve that grievance.'' Meyers had never before cleaned bathrooms at the facility. Previously, Murray had rotated this work among the newer employees. Meyers continued cleaning the bathroom until the end of December, and in about October, Aponte was assigned to clean another bathroom at the facility. Without reciting Rattner's 611(c) testimony at length, it was, again, generally, evasive and not responsive, although she did testify that she did not direct Murray to assign Meyers to clean the bathroom. As part of Respondent's case, in answer to questions from her counsel, her answers were clear, concise, and direct:

Q. Did you ever instruct Michael Murray that they had to clean the bathrooms every day?

A. No.

Q. What, if any, instructions did you give to Murray about the cleaning of the bathrooms?

A. That we needed a schedule for maintaining the cleanliness of the bathrooms, and that this should rotate among the workers.

Q. And what was Mr. Murray's response?

A. He agreed.

Meyers testified that in about September or October, right after he gave a grievance to Murray, Murray told him that

from then on he was to clean the bathroom and he did so until about December. Murray also told Aponte to clean another bathroom at the facility; Aponte is a union committeeman. On cross-examination, Meyers testified that after he had been told to clean the bathroom in June or July, he did it continuously until the end of the year. He was asked, if that was so, why did Murray have to tell him *again* in September or October to do it; he could not answer this question. Aponte testified that about this time, Rattner accused him of standing around talking to a fellow employee when he should have been working; he denied it. Aponte asked Rattner why she was harassing him, and she said that she would harass him until he left her employ. Later that day she asked him if he felt that he was being harassed and he said that he did. She told him that he should go to the Union and tell them and he said that he would. Rattner told Frank to give him a warning for not working, and he received a warning, dated October 5, stating: ''Employee was seen not working. Also a warning for conduct.'' Later that day, Murray told him that he was to clean the bathroom on the second floor. He said that he would do it, but under protest because he had never previously done it. He continued to perform this work until December 22. Murray testified that in about October, Meyers and Aponte together filed a grievance complaining that the bathrooms at the facility were dirty. Rattner directed him to assign Meyers and Aponte to clean the facility's bathrooms because they filed this grievance. They had not previously been assigned to clean the bathrooms. Rattner testified that she never instructed Murray to assign Meyers and Aponte to clean the bathrooms and doesn't know whether she received a grievance regarding the cleanliness of the bathrooms.

It is next alleged that in about June or July, Respondent suspended Aponte for 3 days without pay in violation of Section 8(a)(1), (3), and (5) of the Act. Aponte testified that he was elected as assistant shop steward in about late 1992; this involved covering for Meyers or Cerezo in their absence. He has filed grievances on his own and he first attended a grievance meeting in about summer 1993. On about June 23, while he was making a batch of paint at his work station, an OSHA inspector came through the facility. Shortly thereafter, Murray told Aponte that Rattner wanted to speak to him; Aponte told Murray that he wanted Meyers to come with him, but he was not allowed to accompany Aponte. Rattner told Murray to give Aponte a 3-day suspension for failing to wear a mask. He testified that he was wearing a mask, while a lot of other employees were not. The procedure is to wear a mask while pouring the paint, as he did. The 3-day suspension states that he had been warned numerous times to wear the proper safety equipment. He testified that he had previously been warned verbally about wearing the mask. Respondent's records establish that he had previously received warnings dated August 1, 1991; January 24, 1992; and January 11, April 16, and June 11. Meyers testified that Aponte became a member of the union committee sometime in about 1993 at which time he (Meyers) told Murray that Aponte was a member of the committee. Aponte attended his first grievance meeting in December. Mundo testified that he didn't know whether Aponte was part of the union committee at the time of the June 16 meeting. Murray testified that Aponte became part of the union committee in about July or August.

Murray testified that certain employees at the facility are required to wear goggles, masks, and gloves during certain procedures, for example, when they are mixing paints. The purpose is to prevent the paint or airborne particles from coming in contact with their skin. Aponte and other employees sometimes removed their mask and goggles. Aponte was given the 3-day suspension in June because Respondent ''wanted to make an example of him, being that he was involved with the union, he was a key figure to do that to.'' He was not present when Aponte was allegedly not wearing his goggles and mask when he should have been, although he knew that Aponte was in the processing area, an area that requires that these items be worn, at the time. He also testified that Rattner and Aponte had ''a very hostile relationship. She didn't like him.'' Rattner testified that Aponte was given the 3-day suspension because he was not wearing a mask and goggles when he should have been wearing it. She did not observe any other employee in the department who was not wearing a mask when he should have been wearing it. She testified further that it was not until early 1994 that she was aware that Aponte was part of the union committee. At that time, Aponte was present at a meeting she had with the Union and she asked why he was there. It was then that she was first told that he was part of the committee.

In about July, while at work, Aponte made a sign about a foot square with the Union's name on it. He did it because many of the employees did not know the Union's name, and he testified that he did it on his breaktime. Rattner saw him with the sign and claimed that he made it during working time, but Aponte claimed that he made it on his breaktime. The next day he was transferred to a different job, filling paint and was given a warning for making the sign. He had previously been transferred when Rattner saw him doing something allegedly improper. The warning that he received for this infraction is dated July 21.

Aponte received a warning dated October 25, wherein he was suspended for 3 days ''as a result of numerous warnings, verbal and written, concerning not working as assigned, and conversing instead of working.'' It is alleged that this warning violates Section 8(a)(1) and (3) of the Act. The sole testimony supporting this allegation is Aponte's testimony that on the day in question while he was working ''moving paint around'' and waiting for the conveyor belt, Rattner passed by and claimed he was talking to another employee instead of working. Aponte claimed that he and the other employee were working, waiting for the conveyor belt. As a result, he received the warning and, that afternoon, Murray told him that he was to clean the second floor bathroom, which he had not previously done.

It is next alleged that Respondent fired Antonio Arias on about July 7 and failed to reinstate him between July 7 and 16, and discharged him again on about August 27 and failed to reinstate him until July 18, 1994, in violation of Section 8(a)(1) and (3) of the Act. The contract between the parties requires employees to become members of the Union within 60 days of the commencement of employment at the facility. The parties stipulated that Arias was first hired by Respondent on October 19, 1992, and terminated March 12. Arias testified that he began working at the facility in October 1992 in the shipping department. He worked for about 7 weeks and Murray ''sent him home'' without a reason. About 2 weeks later he returned to Respondent's employ this

time mixing paint. He filled out a new job application and again worked for 7 weeks and was sent home by Murray without reason. In July, he was called again and told to return to work the following day ''as a new employee'' in the lab. He filled out another job application and worked for another 7 weeks at which time he was fired by Murray, although there had been no complaints about his work. He was never a member of the Union and never returned to Respondent's employ again. Murray testified that Arias worked for the Respondent on several occasions. On the first occasion, he worked for 3 or 4 months at which time Rattner instructed him to let him go, allegedly because his did not perform quality work, whereas the real reason was that if they kept him he would have to go into the Union. Approximately 3 weeks later he rehired Arias as a new employee on the instructions of Rattner, who felt that he did good work and that they should use him again. She directed Murray: ''Bring him back and take him up to the 60 days point and then . . . release him.'' They did that to Arias on three occasions, in order to prevent him from working for 60 days, when he would have had to join the Union. Rattner testified that she never directed Murray to terminate employees when they were about to reach their 60th day of employment with Respondent.

Rattner was especially difficult and testy when being questioned pursuant to Section 611(c) about Arias and his personnel files. Some examples are:

> Q. When I was out at your factory on Friday, I looked at your personnel files, isn't that correct? You provided me personnel files, isn't that correct?
>
> A. Presumably you looked; I was not watching what you looked at.
>
> Q. You provided them to me, isn't that correct?
>
> A. The company provided them to you, yes . . . .
>
> Q. Who handled the terminations in the factory?
>
> A. I need a definition of termination.

Arias' payroll records establish that he worked from the week ending October 23, 1992, to the week ending March 5; during the final 8 weeks of this period, he worked 3 40-hour weeks and 5 32-hour weeks. He returned to Respondent's employ the workweek ending June 4 and worked until the workweek ending August 27. He worked 40-hour weeks for each of the final 9 weeks of this period. It is not clear from these payroll records whether there was a break in his employment service between the workweek ending June 18, when he worked a 32-hour workweek, and the workweek ending June 25, when he worked a 40-hour week.

In a similar vein, it is alleged that Respondent discharged Ted Sossinski in about October or November, and failed to reinstate him in violation of Section 8(a)(1) and (3) of the Act. Sossinski did not testify. Murray testified that Sossinski was hired on July 13 and terminated August 13. He was a very good employee, but was terminated because: ''We were not allowing anybody to have enough time to go into the union.'' For about a year, at that time, they had not had any employee who worked for a long enough period to join the Union. He was rehired on October 4 ''as a new employee with nothing accrued'' and was terminated on November 19. Two days earlier, at a meeting, the Union notified Murray that Sossinski had a total in excess of 60 days of employment at the facility. Murray told Rattner that Sossinski ''had kind of slipped through the network, so we got rid of him the next day.'' Murray testified:

> Well, it happened to everyone that we hired for the period of a year, because no one ever made 60 days. If the union didn't question us on it, we would let them go past their 60 days, but the minute they brought up the issue, they were gone.

Mundo testified that at a meeting with Respondent he asked about certain employees and Murray stated that Sossinski was fired after their meeting on November 17 because the Union notified them that he was employed long enough to be in the bargaining unit. Adams testified that at the November 17 meeting, the Union told Murray that employees had to go into the Union after 60 days of employment at the facility. She told Murray that there was an employee named Ted who should have been in the Union, and Murray said that he was employed there, but that he would terminate him. As stated above, Rattner eventually testified that she never instructed Murray to terminate employees before they reached 60 days' employment. She had no direct role in Sossinski's termination; however, she was informed that he did not produce the I–9 form that is required for employment with Respondent. As credibility is an important issue here however, it may be helpful to recite some of her initial testimony as a 611(c) witness:

> Q. Are you familiar with an employee named Ted Sossinski?
>
> A. I know the name.
>
> Q. Isn't it true that he worked for you on more than one occasion?
>
> A. I don't know.
>
> Q. Do you know what department he worked in?
>
> A. We have no departments.
>
> Q. What area did he work in?
>
> A. We have no areas.
>
> Q. Do people have job classifications?
>
> A. No.

It is alleged that in about October, Respondent assigned Meyers to work overtime in violation of Section 8(a)(1), (3), and (5) of the Act. Meyers testified that in about October, he filled out some grievances for employees about harassment. He had the grievances in his hand preparing to give them to Murray or Rattner when he met Rattner on the second floor of the facility at about 4:15 p.m. She asked him what he had in his hand and he told her that they were grievances that he was going to give her and she told him to put them down and to give them to her after work. About 5 minutes later when the workday was over, Meyers gave the grievances to Murray. About 5 minutes later, he was told that he had to work overtime; he was not given a choice on the subject, and he testified that he had never previously been assigned to work overtime. Murray testified that on October 22, he received a grievance from Meyers regarding the assignment of mandatory overtime. Shortly thereafter, Rattner told him that Bermas said that Respondent could assign mandatory overtime to employees. He knew that Meyers did not want overtime work, and later that day, he told Meyers that he had to stay overtime that day, or he was not to

come in the following day. He was given this overtime in retaliation for submitting the grievance and being the shop steward. Rattner testified that Meyers was not given overtime work because he complained about overtime work or because he filed a grievance about overtime assignments.

It is further alleged that Respondent violated Section 8(a)(5) of the Act by denying the Union access to its facility since about October 26, notwithstanding the contract between the parties. Article 23 of the contract, plant visits, provides:

> A duly authorized representative of the Union shall be permitted access to the factory of the Employer upon condition that he shall before entering the factory, make application therefor to the Employer, and upon further condition that he shall not during such visits interfere with production in the factory.

Adams testified that prior to October, the Union had no problem with visits to the facility; ''Mr. Melton, or anyone who chose to go over there, was allowed to go through the plant with no problem whatsoever. We'd park the van or the car in the back and just walk in. There was no problem.'' They did not have to call ahead of time, and did not need an escort at the facility. By fax to the Respondent dated October 26, Adams wrote that pursuant to article 23 of the contract, the Union ''would like to visit the plant on Wednesday, October 27, 1993, on or about 11:00 a.m. If, for any reason, you will not permit this visit, please explain why, and notify me immediately.'' Rattner wrote Adams that she could not come to the facility because Bermas was not there on that day and that ''[a]n appointment will have to be made to accommodate your request. We would also [have] to know the purpose of your visit.'' Adams then called Horvath and asked him to accompany her to the facility. When they arrived at the facility they spoke to the receptionist on the speaker phone at the entrance and asked permission to come inside to speak to Rattner or Bermas. She told them that they could not come in because Bermas was not there. She and Horvath noticed Bermas' car in the lot and Horvath got on the speaker phone and asked to see either Rattner or Bermas. They were allowed in and were met by Constantine Karras, the bookkeeper, who told them that they could not meet with Rattner, and Bermas was not available, so they left. By letter to Respondent, dated November 19, Adams notified Rattner ''that as a duly authorized representative of the Union, we would like to visit the plant on November 29, 1993 at approximately 11:00 a.m.'' She received no response to this letter.

Murray testified that prior to October, article 23 of the contract ''was interpreted in a very loose fashion that we could handle it informally.'' Prior to this time, the Union did not have to make written notification, did not have to ''formally'' give the reason for the visit, and did not have to be escorted throughout the facility. At about that time, Rattner told him: ''they're holding us to the contract, so we're going to hold them to the contract, and it says here they have to apply, we interpret that they have to give written notification and it has to be approved by the company.'' Mundo testified that prior to a meeting that the Union had with Respondent's representatives on December 1, as will be discussed more fully below, OSHA found numerous violations at the facility. Sometime thereafter, but still prior to December 1, OSHA wrote to the Union that they had reached certain agreements with Respondent because Respondent alleged that it cleared up the violations. He testified that he believes that under OSHA rules a party has a specific period in which to file exceptions to such an action. Adams' November 19 letter to Respondent was sent to determine whether the violations had been cleared up. In addition, at the wage reopener meeting on December 1, Mundo told Bermas that the Union wanted to visit the facility, but Bermas said that he didn't think that the Union had that right. Mundo showed him article 23 of the contract, and said, ''Now do you think that we have the right to go in?'' Bermas responded: ''We don't see any reason for it. Besides, you didn't give us sufficient notice.'' Mundo said, ''Well, we're all standing here now, let's pick a day so that nobody can say that we didn't give you sufficient notice,'' but Bermas refused to allow them to visit the facility. Mundo told Bermas that they had to visit the facility within the time period that OSHA gave them to object to its agreement with Respondent. Bermas said that the union people who work at the facility could do it, ''we're not allowing the Union in.''

Rattner testified that she refused Adams' October 26 request for access to the facility because it was not possible to arrange a visit for the following morning, and these visits were Bermas' responsibility and he was not available to escort the union representatives throughout the facility. In addition, due to the nature of the operation, they have to restrict access to the facility because of the possible danger of a visitor smoking or getting splattered by the paint. She had never previously received a request from the Union to visit the facility. Bermas also testified that prior to this request, he had never received a request from the Union to visit the facility.

It is next alleged that on about October 15, Respondent reduced the frequency with which it paid its employees from once a week to once every 2 weeks in violation of Section 8(a)(1) and (5) of the Act. Murray testified that on a Friday in October he went to get the paychecks to distribute to the employees and was told that there were no checks, that beginning that week employees would be paid biweekly. He informed the employees of the change on that day. To his knowledge, Respondent did not first discuss this matter with the Union. A memo from Rattner to all employees, dated October 15, states: ''A change has occurred in the payroll system. Future payments of wages will be made every two weeks for wages earned over a two week period. You will receive the next payroll check on 29 October 1993.'' This biweekly pay lasted until December 22. Mundo testified that in October Adams told him that Respondent's employees informed her that beginning at that time they were going to be paid every 2 weeks instead of every week. He called Rattner and told her that it was a breach of contract for her to unilaterally change the payroll week without first discussing it with the Union. She told him to speak to her attorney, Gerald Richman, which he did, and Richman said that he would discuss it with Rattner. By letter to Rattner dated October 22, Mundo objected to this payroll change, alleging that it violated the contract. He testified that the Union received no prior notification from Respondent about this change. The Union filed notice of arbitration about the change, and shortly before the arbitration was to take place, Richman told him that Rattner agreed to return to the weekly payroll. By letter to Mundo dated December 8, Richman confirmed that ''be-

ginning with the upcoming pay period,'' Respondent would return to a weekly pay system. On December 22, the employees eventually received checks for 2 weeks' work. Rattner was asked by the General Counsel:

> Q. Did you discuss this [the payroll change] with anyone from the union, Local 8-712, Oil, Chemical and Atomic Workers, AFL–CIO?
>
> A. It was not my responsibility to discuss with the union,
>
> ADMINISTRATIVE LAW JUDGE: Remember, yes or no.
>
> A. No, I did not.

The next allegations involve the Union's request for information and the Respondent's alleged refusal to provide the information. It is alleged that by letter dated November 29, and by oral request on about December 15, the Union requested that Respondent provide it with information concerning the cost of medical insurance and types of coverage provided; that by letter dated about December 1, and by oral request on about December 15, the Union requested that Respondent provide it with a list of all current employees, their job titles and hourly pay; and that by letter dated about December 1, and by oral request on about December 15, the Union requested that Respondent turn over its financial books and records to the Union. It is alleged that the Union was entitled to these financial records because on about December 1 and 15, at the wage reopener talks, Bermas informed the Union that Respondent could not afford any increase in wages or medical benefits.

Article 13(e) of the contract provides:

> Either the Union or the Employer, upon thirty days prior written notice to the other party, may reopen negotiations as of December 1, 1992 and/or December 1, 1993, solely on the issue of the rates of pay during the then remainder of the term of this contract. In all other respects, except as provided in Paragraph 17 (b)1C of this contract, this contract shall remain in full force and effect until November 30, 1994.

Article 17(b)1C provides an identical reopener on the subject of medical coverage. By letter to the Respondent dated November 29, Mundo wrote:

> In preparation for the collective bargaining negotiations concerning wages and medical benefits which is scheduled for Wednesday, December 1, 1993, please provide me, on behalf of the Union, with the information regarding the cost of medical insurance and types of coverage which was stipulated that you would provide the Union as a result of the July 16, 1993 arbitration.

Mundo testified that the Union needed this information because medical coverage was one of the subjects available for reopening, and in order to ''intelligently discuss and negotiate'' about this item, they needed this information which, at the time, only the Respondent knew. By letter and fax dated December 1, Mundo wrote Rattner:

> On behalf of Local 8-712 OCAW, I hereby request the following information which is necessary for the Union to prepare for current negotiations concerning wages.
>
> A list of all current employees, their job titles and hourly salaries. Since employee's job functions have often been changed, it is necessary to have this information on an individual basis.
>
> Since this information is relevant for our negotiations session today and you do not have a large workforce, please have this information for us at this afternoon's meeting. In addition, please have the information previously requested regarding the medical insurance coverage available for today's negotiations.

Bermas testified that in about August or September, the Union had requested a list of all union members, and the dates of hire and wage rates and he supplied this information to the Union. On December 1 the Union again requested this information and Bermas said that he had already given them the information. After consulting with his client, Mundo said that they wanted a list of all former employees, going back to the commencement of the contract, as well as the present employees. Bermas said that he didn't have that information with him, but he would have Karras prepare the list. Bermas left Respondent's employ on December 30, prior to receiving this list. He never refused to give them this list. As to the Union's request for health insurance information, he testified that, although he does not remember receiving the November 29 letter requesting the medical insurance information, Mundo asked for it at the December 1 meeting:

> I said to him [Mundo] . . . when the company reduced the medical benefits pursuant to the language in the agreement a year ago, there had been no request for information; there had been no reopener even on these benefits. Now the second year the company was not changing the benefits, they were continuing with the same benefit level and I just didn't see why any cost information was appropriate.

Mundo testified that at the December 1 meeting he asked Bermas for the medical benefit information requested in the November 29 letter, but Bermas said that they weren't entitled to the information. Mundo asked: ''How are we supposed to negotiate if you don't tell us what benefits there are and the cost of those benefits?'' Bermas refused to provide this information. Mundo then asked for the payroll information requested in the December 1 letter and Respondent gave him the list of current employees with their wage rate written in. This list was not adequate because the Union suspected that people were working at the facility who should have been, but were not, union members, and Mundo told Bermas that the list did not satisfy their request because it only gave the information for existing union members. He asked Bermas how many people were then working at the facility, and Bermas refused to answer, saying that it was none of the Union's business. Mundo then gave Bermas a copy of the Union's demands for the reopener: it requested a $2.50-an-hour wage increase and a request to ''reinstate the medical coverage that was in effect on December 14, 1992, including prescription coverage.'' Mundo testified that Bermas' response was:

> There would be absolutely no wage increase, the company couldn't afford it, business was bad . . . so there was no way the employer could afford it. He told me,

> right now anything that costs money we are not going to do. I asked about the medical benefits, he said forget it, we're not going to pay anything additional; there'll be no increases at all at this time. I said are you telling me that the company cannot afford to pay any increases? He said that's right, there's no way we're going to pay any increases, we can't afford it. I specifically asked him, are you telling me the employer is pleading poverty in this case, that they can't afford any increases? He said, there'll be no increases, that's right. I'm telling you, we cannot afford it. At which time I then asked to be able to view the company's books and records since they were pleading poverty in negotiations, that they could not afford to pay it. He said absolutely not, there's no way we'll turn it over.

Respondent never gave the Union its books and records. Murray testified that, at this December 1 meeting, after the Union asked for the additional wages and health benefits, Bermas said: ''We didn't have the best of years, and we couldn't afford to give out any salary increases, and we were not changing the health benefits, we couldn't afford to.'' Bermas also said that Respondent could not remain competitive if they gave the employees increased wages.

The parties met again on December 15. The date was arranged in conversations between Mundo and Rattner, when Rattner told him that December 15 was the only day that she was available to meet. When they arrived at the facility on that day, Rattner was not there. Mundo asked Bermas where Rattner was, and he said that she was at the facility, but was not going to attend the meeting. Mundo objected to her absence, and asked Bermas if he would give him the information that he asked for. Bermas said that the Union had no right to the medical information. He asked for the information about the employees working at the facility, and Bermas refused to give him that information as well. Mundo asked Bermas if he had the authority to negotiate about the reopener issues and Bermas said: ''We don't have any money to give; there'll be no increases.'' Bermas testified that on December 1 and 15, pursuant to the reopener, the Union asked for about a $2-an-hour increase and to have the medical benefits returned to the level they had been before being reduced in the prior year. Bermas told him that there would be no wage increase: ''the condition in the paint industry . . . was very difficult and the competition was very tight and . . . if Paragon were to give any wage increase or any other of their cost increases, they just would not be able to be competitive any more.'' He testified that at these meetings he never said that Respondent could not afford a wage increase:

> I knew enough about labor law to understand the difference between a company pleading that they couldn't afford to give an increase and that they couldn't do it for competitive reasons. . . . As I understand it . . . if your claim at the collective bargaining table is that you can't afford it, then you have to substantiate that by opening up your books to the Union, and the company just didn't want to do that. And besides, that was not the fact, it was not a case that they could not afford it.

The remaining allegations relate to the events of December 22 and thereafter. Wednesday, December 22, was a payday and was the final workday that week because of the Christmas holiday. The next workday was scheduled to be Monday, December 27. The events of December 22, triggered by Respondent's initial failure to pay its employees 2 weeks' pay to make up for the change to the biweekly pay system 2 months earlier, caused a work stoppage that began that day and lasted until February 1 and then until about March 6.

Cerezo testified that on December 22, the employees were expecting 2 weeks' pay because they had not been paid the prior week. They received their checks and it only was 1 week's pay and they asked Murray why they were not paid for 2 weeks and he said that he didn't know. All the employees then went to the second floor of the facility to speak to Rattner. Cerezo, Meyers, Aponte, and one other employee went to Rattner's office and asked about their pay and she told them that they had already been paid and that they should leave. They said that they were owed 2 weeks' pay because they had not been paid the prior week. She asked Murray if it was true that they had not been paid the prior week and he said that it was true. The employees said that they would not leave until they got all their pay, and Rattner and Murray went into the office. Murray came out 15 minutes later and said that their checks for the prior week would be mailed to them. The employees said that was not acceptable because they needed the money for Christmas shopping. At about 6, Karras, the bookkeeper (who had been away from the facility on jury duty), arrived and asked what the problem was. When he was told that the employees were demanding their pay for the prior week, he said, ''What are you talking about? It's in the safe.'' Murray and Karras went into the office and got the checks. Murray then told the employees that all the employees, with the exception of six, would get their checks. He handed out the checks to all except six and he told those who were paid to leave the building. The six who did not get their checks, apparently, Earl Bruno, Juan Serrano, Juan Gonzales, Jose Vendrell, Javier Restrepo, and Pedro Mercado, were told to go upstairs to see Rattner. Cerezo testified that he and the other employees who were paid followed Murray and the six employees upstairs because they wanted to make sure that they were paid; however, they were not allowed to enter the area. They stood on the floor and heard Rattner apologize for what had occurred and tell the employees that they were to report for work on Monday. Murray opened the door and told Cerezo and the other employees that they were not to come to work on Monday, Rattner only wanted the six employees with whom she spoke to work on Monday. This was the first time that they were told not to come to work on Monday. Cerezo, who had been employed at the facility for 17 years, testified that he had never previously been laid off. There had been occasions when some employees' workweeks were cut to 32 hours, usually by seniority, but they were given about 2 days' advance notification of this change. The employees complained that there was no prior notification of this layoff and that it was not done by seniority, and said that they were all going to report for work on Monday, which they did. They arrived for work the usual time on December 27, but Murray told them that only six named employees whom Rattner wanted would be allowed in. Some of the employees asked why they were not being allowed to work and why weren't they chosen by seniority, and Murray said that Rattner only wanted those six. The employees said that if all

of them couldn't work, none would work. They remained outside the facility until 4:30 p.m. and none of them worked.

Earl Bruno, who had been employed by Respondent for 17 years, testified that when he was given his check by Murray on December 22, it was only for 1 week's pay when it should have been for 2 weeks. He and the other employees said that they were entitled to 2 weeks' pay, but Murray said that Rattner said that they were only entitled to 1 week's pay. They all handed Murray their checks and went to see Rattner. Bruno stayed in the back, while Cerezo and some other employees were in front and went into Rattner's office. Cerezo told Rattner that they should have been paid for 2 weeks, not one, and she took the checks from Murray and they went into her office. At about 6 p.m., Karras arrived and when they told him the problem, he said that their checks were in the safe. A few minutes later, Karras and Murray came downstairs and said that they had the correct checks, but were ''holding back'' six checks, and that those six employees should go upstairs to speak to Rattner. Bruno and five other employees were not given their checks and went to the second floor to speak to Rattner. Rattner handed them their checks, apologized for the problem, and told them to have a nice Christmas. ''Pedro'' asked about his vacation and Rattner said that she knew about it and would take care of it. Bruno said that he wasn't paid the correct amount because of his vacation and asked Rattner to look into it. She said that she had a dinner appointment that night and didn't have time to look into it. She walked away, and ''all of a sudden she turned around and she told me, you stay home on Monday, too.'' On the following day, Bruno was called by Joanne, the receptionist at the facility, and was told that he was not to come to work on Monday. He testified that about 3 or 4 years earlier there had been a layoff at the facility where certain employees were informed during the day that they would be laid off at the end of the day. He was not laid off because of his seniority.

Aponte testified that on December 22, when they got their checks, they realized that they had only been paid for 40, rather than 80, hours of work. They told Murray that they should have been paid for 80 hours, and he said that was all they were supposed to get. They said that they were not going to leave until they were paid all that they were owed. Later, when Karras arrived, they told him of the problem and he said that the checks were inside. Murray then gave out the checks and said that whomever did not receive a check should go to the second floor, as Rattner wanted to speak to them. Six employees did not get their checks and they went to see Rattner. The other employees ''were concerned that they might not get paid,'' so they followed them to the second floor. When Rattner saw them she said: ''Didn't you get paid? Why don't you go home?'' Aponte said: ''Just pay them and we'll all go at the same time.'' Rattner said: ''Whoever got paid, go home.'' They started to walk out and heard Rattner screaming at Murray ''that she wanted all of us laid off for that day.'' Aponte, who had been employed at the facility for 7 years, testified that he had been laid off in the past, but was notified days in advance of the layoff and was able to use sick leave or vacation days for the layoff period. On December 22, the employees were first advised of the layoff at about 6 p.m., and were not given the option of using sick days or vacation days for that period. All the employees appeared for work on Monday morning, but the gate was closed and they were not permitted to work. They appeared at the facility every day until February 1, when they returned to work, albeit, briefly.

Mundo testified that on the evening of December 22 he received a telephone call from Cerezo, who told him of the events of the day as discussed above:

> So my advice to Mr. Cerezo was that it appeared that this was purely retaliatory by the employer and that this was an unfair labor practice, and that it was up to the employees, if the employees wanted to band together and take action. That, in fact, I advised them that they should all report to work on Monday. I told them that they should sign in, have a sign in sheet to show that everybody was there, and everybody ready and willing to work because the employer's actions were clearly illegal and improper . . . .

Murray testified that in the past Respondent has had seasonal layoffs in around December or January. On these past occasions (prior to 1993), Respondent notified the employees at least 2 weeks in advance and gave them an opportunity to use accrued sick leave or vacation time during this period. In December, he was not specifically told that there was to be a layoff until late in the afternoon of December 22. He testified: ''It happened every year, so I didn't have to specifically be advised, but I wasn't specifically advised that that day it was going to happen.'' He testified that on December 22, after he gave the employees their checks, they complained that they were owed for 2 weeks' work. He reported it to Rattner, who said: ''This is the payroll, it's prepared and that's it.'' The employees refused to leave the facility until they got their 2 weeks' pay. Rattner prepared to write new checks for the employees to cover the second week's pay when Karras arrived and the employees were given their full compensation. When he was about to give the employees these additional checks, Rattner told him that on Monday the facility would be closed for a seasonal reduction and she only wanted six employees to come to work on Monday. This was the first that he heard of this reduction. Rattner gave him a list of six employees and he was told to tell those employees to go to see her in her office. He did that, and told the other employees to go home and not to report for work on Monday, but to call him on a daily basis and he would tell them when to return. He went to Rattner's office with the six employees and she told them to come to work on Monday. They said that they would not come to work unless everybody came back. Bruno, who had been asking him about alleged accrued vacation time that he had, then asked Rattner if he could get his vacation time. Rattner said that it wasn't the proper time to discuss it. ''But he pursued it for whatever reason, and tempers flared, and Mrs. Rattner told him that he was not to come in on Monday.'' On Monday, all the employees reported for work. He asked Meyers if the six employees that they wanted were going to report for work. Meyers said that they would not work unless everybody worked, and they were not allowed to work. This procedure continued on a daily basis until his employment with Respondent ended 2 weeks later.

Murray testified further that Respondent has an inventory done every year, and, as of December 22, it had not yet been done. Therefore, he knew that it had to be performed on De-

cember 27, 28, and 29, because the facility was to be closed on December 30 and 31. When asked on cross-examination: ''And you knew you didn't need the full complement of employees?'' he testified: ''Well, no, that doesn't follow.'' He testified that ''the inventory was taken around production'' and that he uses three or four of the unit employees for the inventory. He was asked:

> Q. Okay, now is it your testimony that you didn't know you needed a reduced work force for the week of December 27th?
>
> A. It was my testimony that I didn't make that final decision and nothing had been said up until that point, but we all knew that that is a slow period. No specific decision, you can't tell people Friday not to come to work Monday.
>
> Q. Well wasn't that your responsibility as plant manager to decide how many people you needed to work each week?
>
> A. It should have been, but I didn't make that decision.

A few moments later he was asked:

> Q. Well, did you ever have a discussion with Mrs. Rattner, hey, it's December 22nd or December 21st, you know next week we're going to have the inventory, we've got to get it done by the end of the week, we don't have any orders. We've got to tell the people, reduce the work force?
>
> A. No, we had no such discussion.
>
> Q. You knew it was going to be slow?
>
> A. Yes, I knew that, that I knew.
>
> Q. And you knew there was going to be an inventory?
>
> A. I knew there was going to be an inventory.
>
> Q. And you knew you only needed four or five people to do the inventory?
>
> A. Right. But we had always done that around production when it was warranted.

Rattner testified that on December 22, she had ''an understanding'' with Murray that they would do an inventory the following week and the sales and production ''would be extremely reduced.'' In prior years, during inventories, ''a select few . . . were called to work during that period.'' On December 22, Murray came to her office and said that there was a problem, that the employees were supposed to get two paychecks and only received one. Earlier, Karras, who was on jury duty, had given her the checks which she had locked in the safe. She was under the impression that the biweekly pay had ended previously and that the employees were only entitled to 1 week's pay. Murray left and, shortly thereafter, the employees lead by Meyers and Cerezo came ''barging'' through the factory, waving their arms and yelling. They spoke to Bermas, who then told Rattner that they said that they were owed 2 weeks' pay. Rattner looked in the safe, but could not locate the additional checks. She then called the payroll company and was told that another set of checks was issued, but she could not find these checks, so she began to write a new set of checks for the employees. Before they could be completed, Karras returned to the facility, showed her where the checks were located in the safe, and they were given to the employees. During this period while they were looking for the checks, ''I raised the subject with Michael Murray as to who was going to be coming back, who was . . . going to be reporting for work for that three day inventory period.'' They decided on six employees who would work the following week and it was Murray's job to notify the employees. Bruno was one of the employees who was originally scheduled to return the next week. She testified however that when he complained to her about his vacation pay,

> I had the very strong sense that there was an order [sic] of liquor at that point and also it was getting on to 6:00 and my impression was that he wasn't his usual self, that perhaps this wasn't a good idea to bring him back.

On the morning of December 27, Murray told her that all the employees reported for work and that their position was that none would work unless they all worked. She never fired the employees. In answer to a question from the General Counsel regarding whether employees are given prior notice of layoffs, Rattner testified: ''The employees were notified the day before if they were not required to come to work the following day.''

By letter dated December 30 (and faxed to Mundo) Richman stated that he was notified by Rattner that nine named employees (none of whom were individually discussed above) were to report for work on Monday, January 3, 1994. Mundo responded to Richman's letter on the same day. His letter alleges that the work stoppage that began on December 22 was a lockout that followed Respondent's unfair labor practice, and that the layoffs were unlawful and were not done in accordance with seniority.[4] The letter asks about the status of all of the union members who were employed at the facility.

On January 5, 1994, representatives of the Union and the Respondent met at a diner near the facility. Mundo testified that during the week of December 27 he had numerous telephone conversations with Richman regarding the situation at the facility. On January 4, 1994, he received a telephone call from an attorney whose name he believes is Robert Sachs, who said that Richman was no longer representing Respondent, that he was, and he would like to arrange for a meeting of the parties. Mundo said that he had been trying to do that since December 27. They agreed to meet at a diner (chosen by Rattner) near the facility at 10 a.m. on January 5, 1994. Everyone (Mundo, Adams, Meyers, Aponte, Cerezo, Melton, and Sachs) except Rattner arrived on time. Sachs said that Rattner would be detained a bit because there were some problems at the facility. At 10:45, Rattner had not yet arrived and Mundo told Sachs that they would remain for only 5 more minutes. At 10:50, they got up, went into the parking lot, and Rattner drove up. Mundo and the union representatives decided to return to the diner with Rattner and Sachs. Sachs opened the meeting by explaining the reason for the meeting. Adams then said something to the effect of: ''She didn't provide us with'' when Rattner jumped from her seat

[4] Art. 9 of the contract states: ''Seniority shall prevail with regard to layoffs, rehiring and promotions. When layoffs are necessary, the last employee hired shall be the first laid off.'' Art. 9 also states that the shop chairman and shop steward shall head the seniority list in the event of a layoff.

and said, ''I have a name, I'm not going to be referred to as she, I want respect and I'm leaving, I'm not going to put up with this.'' She got up and left and that was the end of the meeting. On the following day Mundo got a call from Sachs saying that he was no longer representing the Respondent. Cerezo's testimony about this meeting is very similar except that he testified that it was Mundo, not Adams, who used the word ''she,'' which caused Rattner to say that she was to be addressed as Mrs. Rattner, that she would not be dictated to, and that she was terminating the meeting. Rattner, who was asked about a meeting that took place at the diner on January 20, 1994, testified that she was late for the meeting because she was trying to hold the operation together during the strike. She testified that the first person to speak was Adams, ''who immediately proceeded to what I considered to be a personal attack on me. . . . She accused me of stealing money, of not paying my employees, of not paying Union dues and a whole lot of things.'' Rather than listen to such a personal attack, she left to return to the facility.

There were numerous letters and telephone conversations after December 22 among Mundo, Richman, and Rattner that were intended to settle the dispute and get the employees back to work. Mundo testified that on January 11, 1994, he had a telephone conversation with Rattner about having the employees return to work. He wrote her a letter dated January 12, 1994, confirming the details of this understanding. It states, inter alia:

> This is to confirm your telephone conversation with me on the afternoon of January 11, 1994.
>
> You stated to me that you want all of your employees who are members of Local 8-712 OCAW, who have not been working since December 22, 1993, to return to work.
>
> The employees will return to work provided that all employees are allowed to return to work, the employer will not retaliate, discriminate or take any disciplinary or adverse action against any employee because he or she has not worked since December 22, 1993 or because of the events of December 22, 1993, which lead up to this action.
>
> The Union and its members hereby reserve all of their rights to take whatever action they believe proper whether via the Courts, the NLRB, the grievance procedure or any other forum it feels proper to protect their rights and obtain any remedies for all acts which have occurred since December 22, 1993.
>
> The return to work of any employee is not deemed a waiver of any such rights.

It should be noted that the nature of the cross-examination of Mundo indicates that Respondent's position is that this letter did not constitute an unconditional offer to return because it provided for the return of all employees, whereas 1 week earlier Respondent wrote to Mundo that it wanted only nine employees to return. Rattner called Mundo after receiving this letter and said that she disagreed with it because the only way that the employees could return to work was if they withdrew their charges at the Board and their grievances. Mundo told her that was not acceptable and such a demand might violate the Act. In addition, Rattner faxed to Mundo a response on the same day. It states, inter alia:

> In a brief telephone conversation with my attorney, I relayed your claim that ''the withdrawal of all charges at the NLRB is in and of itself a violation of the labor law.'' He informed me that there is a procedure for retracting such charges.''

On that same day, she also faxed him a letter stating that as she told him in a telephone conversation that day, she never agreed to the statements contained in paragraphs 4, 5, 6, 7, and 8 of his January 12 letter. Still later that day, Mundo wrote another letter to Rattner summarizing their earlier correspondence and conversations that day and concluding that the union members ''are agreeable to return to work at Paragon Paint, provided they reserve all of their rights at the NLRB, through the grievance process and via any other forum they may have available to them.'' Between that date and late January, Mundo and Richman had numerous conversations in which they attempted to come to an agreement providing for the employees to return to work. This eventually resulted in an agreement that the employees would return to work on February 1, 1994, which they did, and which will be discussed more fully below.

The parties met again on January 20, 1994, with basically the same individuals representing the Union, and Richman and Rattner representing the Employer. At the conclusion of the meeting a tentative agreement was reached wherein the employees would receive a 3-percent wage increase and would be paid $275 backpay to cover the prior 4 weeks of being out of work. This agreement was subject to ratification by the employees, and the committee members who were present at the meeting said that they thought that there would be problems getting the employees to approve this settlement. The employees voted not to accept this tentative agreement, apparently, because they were angry that Rattner referred to the $275 backpay as ''bread money,'' which some of them considered insulting.

Richman wrote to Mundo on January 27, 1994, that Respondent was puzzled by the lack of response from the Union to the apparent settlement agreed to a week earlier. The letter states that unless Respondent hears from the Union by noon on January 28, 1994, that the employees will return to work on Monday, January 31, 1994, Respondent would be forced to hire replacement workers to maintain its business. On the following day, Richman again wrote to Mundo that he expects the employees to return to the facility on January 31, 1994, and that the return would ''be without prejudice to any and all outstanding charges which may presently be pending before the Labor Board.''

At the orders of their delegate, the employees returned to work on February 1, 1994, at the usual reporting time, before 8 a.m.; Rattner arrived about 40 minutes later. Cerezo testified that Rattner asked Fred Frank, Respondent's general manager at the facility, what Aponte was doing on the labeling machine, where he was working that morning, and where he had worked prior to December 22. Frank then transferred Aponte to labeling cans by hand and she then asked where Meyers was and Frank said that he was working on the third floor. Rattner left the second floor and, about 15 minutes later, Meyers came to the second floor and said that Rattner had been harassing him on the third floor. Rattner then re-

turned to the second floor and said that she wanted to have a meeting with all the union members. Cerezo picked up the intercom phone to page the employees on the other floors to come to the meeting, and Rattner grabbed the phone away from him, saying that he had no right to use that phone, she was the boss, and it was her phone. Meyers said that he did have a right to call the members together for a meeting since he was the assistant shop steward. The meeting took place at about 9 a.m. that morning; all the union members were present, as were Rattner and Frank. Rattner said that she wasn't running a nursery and that she was not harassing them, that harassment meant either profanities or physical contact. She said that they had to wear safety shoes at work and that she expected an honest day's work from the employees and that is why she was critical of them. Meyers asked a question, which Cerezo could not recollect, and Cerezo asked her how were the employees supposed to change into the safety shoes when she removed their locker room. Rattner then told the employees that whoever wanted to work should return to their work stations because the meeting was over. Because the meeting took 15 minutes, they would not get a coffeebreak that morning. Cerezo returned to work and Rattner told him that he should follow her into the stockroom where the cans of paint are stored. She pointed to a batch of 5-gallon paint cans each weighing about 50 to 70 pounds and told Cerezo to bring her the cans. Cerezo said that he didn't have a handtruck, and Rattner said that he should carry it by hand, which he did. At that point she told him to put it back. When he questioned her about it, she said: ''If you want to work for me, you do as you're told.'' An employee who was nearby said that she was harassing Cerezo, and she denied it and said: ''Get out, go march in the snow one more time for another month or so.'' Cerezo prepared to go down the stairs and she told him that was not the way to go. When he continued, without arguing with her, she grabbed and pulled on his jacket. Cerezo testified that as he was preparing to leave, he saw Rattner stop employee Juan Gonzales and ask him: ''Are you staying with me or are you with the Union?'' Gonzales answered that he was a union member and was going with the Union. Rattner then stopped another employee whose name is uncertain in the record. She put her hand on his chest and asked if he was staying. He said that he was not crazy, that he was going.

Bruno testified that on the morning of February 1, 1994, Rattner spoke to all the employees and said that telling the employees to work fast is not harassment. A few minutes later, Cerezo made an announcement in Spanish over the intercom. He asked a Spanish-speaking employee to translate and was told that Cerezo said that they should return to the second floor. When he got there, Cerezo told him that Rattner kicked them out of the plant and they had to leave, so he did.

Meyers testified that on the morning of February 1, 1994, he began working on the third floor of the facility, but Rattner instructed Frank to assign him to a job on the second floor. At about 9 a.m., Rattner had a meeting of all the employees and told them that she was not running a nursery; that the employees were there to work, and if they didn't want to work they should get out. Meyers and Aponte said that she was harassing the employees and she said that harassment is using profanities of attacking somebody. Rattner also told them that they couldn't work unless they wore the proper workshoes, and Cerezo said that they had no place to change into the shoes. Rattner said that she was putting Cerezo in charge of employees' work clothes and shoes and that they should change in the bathroom, which they had not done previously. Rattner then told Cerezo to come to the shipping department and to move 2- and 5-gallon cans of paint. Normally they move them with a handtruck, but there was no handtruck, so she told him and Karras to go downstairs to get a handtruck. As he was coming back upstairs, he heard Cerezo on the intercom telling the employees to return to the second floor. When he got there, Cerezo told him that Rattner was harassing him. Rattner told the employees that If they were not there to work, to get out, and if they didn't leave, she would call the police. Meyers went upstairs to get his coat and Rattner asked him where he was going. When he responded, she had Frank follow him. He got his coat and left with the other employees.

Aponte testified that on February 1, when he returned to work, he went to the machine that he had operated prior to December 22, the labeling machine. A few minutes later, Rattner came by screaming that she didn't want him working on that machine, she wanted him to put ''labels on quarts,'' a job that he had not previously performed. She stood over him for about 5 or 10 minutes, saying that she wanted him to label them ''right now.'' He said that he would do them, but could not do them all at the same time. Rattner then asked Frank where Meyers and Cerezo were; Frank said that he gave them an assignment, and Rattner said: ''You're not to assign them anything. I'm going to assign them work.'' Aponte continued working until the meeting was called where Rattner spoke to the employees. At this meeting Rattner defined harassment as using foul language or hitting an employee. Aponte was translating what she said to a Spanish-speaking employee and Rattner told Aponte to shut up. He said to her: ''You're talking about harassment and you're screaming at me to shut up.'' She said: ''Just shut up,'' and he did. Cerezo asked where the employees could change, and she said that she was putting him (Cerezo) in charge of everybody getting changed in the bathroom. Cerezo told her that the bathroom was too small. At the conclusion of the meeting Aponte returned to his labeling machine. Later that morning he saw Rattner telling Cerezo to get ''a five'' can of paint. He saw Cerezo carrying it on his shoulder, whereas they usually transported these cans by handtruck as they weigh 40 or 50 pounds. He then saw Rattner directing Cerezo to return the can to where it had been previously. Cerezo did it, as ordered and waved to Aponte to come to him. When he got there, Cerezo said: ''She's making me carry the fives from one place to another and back.'' Aponte then said to Rattner: ''I thought you said that you were not going to harass us?'' Rattner responded: ''If you want to work here, you'll do as I say.'' Aponte said that they would do what she said, ''but not that way.'' Rattner then said: ''If you're going to work with me, you work with me. If not, get out.'' Aponte asked: ''What do you mean, get out?'' Rattner screamed: ''Just get out. Get out of my factory.'' Aponte asked: ''Are you throwing us out again?'' Rattner said, ''Just get out.'' He said that he wanted to get his clothes and change, and she said that he should just get his clothes and leave. As he was preparing to leave, he saw Rattner pull on the coat of employee Fer-

nando Ramos and she was saying to all the employees that they should get out. As they employees were leaving, she said: ''Why don't you go outside and walk a little more in the snow. Maybe that month wasn't enough for you.'' He later returned to work on about March 7, 1994, and left Respondent's employ on June 28, 1994.

Rattner testified that she had no advance knowledge that the employees were going to report for work on February 1, 1994. Frank called her at about 7:30 that morning to tell her that the employees were standing outside and were told to report for work. Rattner told him to let them in, which he did. She arrived at the plant at about 8 a.m. and ''immediately went to the working areas and tried to assign, help assign people to different jobs.'' This was a difficult task because the employees had been out for 2 months, she had no time to prepare for their return, and Murray was no longer working for her. Because of the difficulties caused by the strike, the storage of materials needed a major reorganization and she told Meyers and Cerezo to follow her to reorganize this storage system. Without any direction from her, Cerezo got on the intercom and told the employees to come to a meeting. When she saw the employees assembled, she decided that she might as well speak to them. Employees were shouting about harassment, and she told the employees that if she tells them to do something they must follow her orders. She told them that they were starting a ''new chapter,'' and that it would initially be difficult because she did not have a chance to plan for their return to work. At the conclusion of this meeting she returned to assigning Meyers and Cerezo to the reorganization of the storage system. She initially directed them to separate the inventory into two categories; the ''specials'' that were produced for certain customers, and the regular stock that Respondent carried. She never told them that they could not use handtrucks to perform this work. In fact, Meyers asked if he could get a handtruck and she told him that he could. Cerezo began arguing with her, picked up a 5-gallon can of paint and dropped it by her feet. Cerezo then shouted something and took the intercom again. Rattner took it out of his hand and he yelled that it was harassment, ''we can't work like this, you are not letting us work.'' Rattner explained what needed to be done and the employees started walking out. She tried to talk some of them into staying at work, but the others said: ''Let's go, let's go.'' As the employees were leaving, she saw that Meyers was going upstairs. She followed him upstairs to see why he was there, and Meyers picked up an item of clothing, turned around, yelled an obscenity at her, and left. She never pulled at Cerezo's jacket and never told the employees to get out: ''No, I tried to keep some of them there.''

IV. ANALYSIS

There are major credibility determinations that must be made here. As may be evident from the recitation of the facts, I was not impressed with the credibility or attitude of Rattner. The change from her responses as a 611(c) witness to her responses as a witness for Respondent a month later can best be described as miraculous. Whereas she had earlier been extremely hostile with a difficulty remembering events that occurred between 6 months to a year earlier, her subsequent testimony revealed a memory adept at recollecting events of her childhood. In addition to observing Rattner on the witness stand, I observed her actions as well during the testimony of the General Counsel's witnesses. Rather than sitting with her counsel, she sat in a chair closest to the witnesses and appeared to be ''staring them down'' during their testimony. Neither the witnesses nor the General Counsel complained about this, and it did not appear to affect the witnesses' testimony, so I did nothing to stop it. This attitude however correlated with her 611(c) testimony and the testimony of the General Counsel's witnesses that depicted her as an Employer who was constantly harassing them and who seemed intent on doing whatever she could to stymie, and ultimately get rid of, the Union. The most important witness for the General Counsel here was Murray. There is a tendency to look very carefully at testimony given on behalf of the General Counsel by former agents of Respondent. Very often, they are angry at their former employer and are looking for a way to get even. This does not appear to be the case with Murray. All that Respondent could establish about him was that Rattner had refused to lend him some money shortly prior to his leaving its employ, and that Cerezo had lent him some money. On the other hand, unlike Rattner, he appeared to be testifying in an honest and truthful manner. For example, as regards the events of December 22, he testified that the production needs at the facility would be reduced the following week and that even with some employees being required to perform the inventory, layoffs would probably be needed. With no difficulty, I credit the testimony of Murray over that of Rattner.

On the first day of hearing here, the General Counsel moved to amend the complaint to substitute Local 406 for the Union on the ground that the Union was merged into Local 406. Counsel for Respondent objected and, in his brief, alleges that this proposed merger was not performed properly by the Union because written notice of the proposed merger was not given to Respondent's employees, and there was no evidence that the merger was approved by a secret-ballot election. The evidence establishes that a regular membership meeting was held in February solely for Respondent's employees, and all attended. At this meeting Adams spoke of the possible merger into Local 406 and that the election would take place on March 8, 1994. Notification of this merger election was given to all shop stewards and those present at prior meetings, as well as being mailed to all employers under contract, except Respondent, presumably because its employees were then on strike and had not been at the facility since December 22. Of the Union's 110 members, only about 7 attended the March 8, 1994 meeting (only 3 employed by Respondent) and those present voted unanimously (apparently not by secret ballot) to approve the merger.

The Board has traditionally required that two conditions be met before it will allow one union to be substituted for another. First, the Board requires that the vote process occur under circumstances satisfying minimum due process standards and, second, that there be a substantial continuity between the pre- and postaffiliation bargaining representative. *Hammond Publishers*, 286 NLRB 49 (1987). As the burden of establishing that the merger was performed improperly rests with the Respondent, and as the Respondent does not contest the second part of this test, the only issue to be discussed is whether the vote and prevote notification satisfied minimum due process standards. *Insulfab Plastics*, 274

NLRB 817 (1985). Respondent objects that the employees never received written notice of the proposed merger. Although the Union could certainly have done more here, all Respondent's employees attended a meeting in February at which they were told of the merger election to be conducted the following month. In addition, shop stewards were given notices of the upcoming election. The Union cannot be faulted for failing to post a notice of the March 8 election at the facility, as the employees had been away from the facility for some time and it seemed highly unlikely that Rattner would have posted, or distributed, such a notice to the employees. Additionally, none of the unit employees were at the facility to see the notice. The Union did all that the Board or courts would require it to do. *Bear Archery*, 223 NLRB 1169 (1976).

Respondent's remaining objection to the merger is that it was not conducted by secret ballot. The merger election was conducted on March 8, 1994, apparently not by secret ballot. Only about seven members appeared and voted and the motion passed unanimously. In *United States Steel Corp*., 185 NLRB 669 (1970), the vote on affiliation was taken by the distribution of ballots that were to be marked anywhere in the room and then were to be placed in a ballot box. Testimony established that persons could, and did, see how others voted. The Board dismissed objections to this vote and amended the union's certification:

> While the actual voting procedures did not follow the format employed in Board-conducted elections, it is evident that inexperience in conducting votes of this nature (elections of officers have been by mail ballot) contributed to the lack of some safeguards. However, there was no challenge at the time of the election or, thereafter until the hearing of the procedures used . . . and there is no evidence of manipulation in the distribution of the ballots, or of coercion in the voting.

The court, at 457 F.2d 660 at 666 (3d Cir. 1972), disagreed because the voting procedure did not comport with the procedure employed by the Board or the Department of Labor and refused to enforce the Board's Order. In *State Bank of India*, 262 NLRB 1108 (1982), the Board, in finding that an attempted merger was invalid because it failed to adhere to minimum standards of due process in ascertaining whether the employees were in favor of the merger, relied on the following factors:

> (1) the distribution of the notice announcing the December 2, 1980 meeting at which the vote on the merger agreement was to be taken was not completed until shortly before the meeting was to take place and therefore was untimely; (2) the notice of the December 2 meeting failed to announce that a vote on the merger agreement would take place; (3) the individuals attending the December 2 meeting did not have access to copies of the merger agreement; (4) no record was kept of the identity of the individuals attending the December 2 meeting; and (5) *in light of the above*, the voting procedure—including the lack of a secret ballot—employed at the December 2 meeting was improper. [Emphasis added.]

Toyota of Berkeley, 306 NLRB 893 at 899 (1992), states that the Board requires that the voting procedure satisfies minimum due process standards, ''and no specific procedures are mandated.'' In *Insulfab*, supra at 823, the administrative law judge stated:

> The Union was under no obligation arising out of statute or regulation to conduct its affiliation vote in a manner deemed suitable by the Respondent. The fact that it did not act in strict conformity with the procedures required for a representation election and chose instead to conduct its business more informally in accordance with the traditions of New England town meeting democracy is no basis for post hoc faultfinding.

In the instant matter, the Union's entire membership in March 1994 numbered about 110. The Union's president had been disabled since about mid-1993. Adams ran the Union, without a working typewriter or fax machine. Although a show of hands might seem somewhat crude in hindsight, considering the size and operation of the Union, I can see nothing improper in it. Only about seven members showed up at the meeting and the vote was unanimous. I find that in light of the facts here, the merger election satisfied minimum due process standards, and the General Counsel's motion to amend the complaint to substitute Local 406 for the Union is granted.

Under *Wright Line*, 251 NLRB 1083 (1980), the General Counsel has the initial burden of establishing a prima facie showing to support the inference that the employee's protected conduct was a ''motivating factor'' in the employer's decision. If the General Counsel satisfies this burden, the burden then shifts to the respondent to establish that the same action would have taken place even absent the protected conduct.

The initial allegations relate to the grievance meeting held at the facility on June 16. It is alleged that Meyers and Cerezo, the shop steward and assistant shop steward for the Union at the facility, were prohibited from attending this meeting (as well as the September 22 grievance meeting) in violation of Section 8(a)(1) and (5) of the Act. The issue, therefore, is whether this was a unilateral change in practice on the part of Respondent. Adams testified that she could not remember how often she had previously been at the facility, but, on those occasions, she was there with the then union president. Murray testified that, in the past, the shop committee was allowed to attend grievance meetings. Meyers, who had been the shop steward at the facility for 3 or 4 years, testified however that he had never previously attended a grievance meeting. Although I have already found Murray to be a credible and believable witness, since this was a subject that Meyers would be more familiar with, I credit his testimony as also testified to by Adams, and find that the union representatives had not attended these grievance meetings in the past. I therefore find that by barring Meyers and Cerezo from attending the meeting during working time on June 16 and September 22, Respondent did not unilaterally change the working conditions at the facility and recommend that this allegation be dismissed. Meyers and Cerezo each received a written warning for attempting to attend the June 16 grievance meeting. Although the testimony differs, it appears that Meyers and Cerezo were either in, or adjacent to, the

room where the grievance meeting was to take place for a very short time, and left and returned to work when they were told to do so. Considering Respondent's union animus here, and the fact that Meyers and Cerezo missed little work due to the incident, I find that the warnings they were given on June 16 were in retaliation for their support for, and positions with, the Union. I therefore find that these warnings violate Section 8(a)(1) and (3) of the Act.

It is next alleged that Respondent violated Section 8(a)(1) and (5) of the Act by placing Bermas in these grievance meetings without giving him the proper authority to act to settle, or bargain about, these grievances. Adams and Mundo testified that Bermas told them that he had no authority to make any decisions, that all had to be made by Rattner. In fact, whenever grievances were discussed, he left the meeting to discuss them with Rattner. Bermas testified that as Rattner's attorney, any agreement he reached with the Union was subject to her approval. In addition, he differentiated between subjects that he was aware of prior to the meeting, and those that he was not aware of. As to the former, he knew how far that he could go without Rattner's approval. As to the latter, he had to go to Rattner for approval of any agreement. I found Mundo to be a credible witness attempting as best he could to testify truthfully about events that occurred a year ago. As stated above, I also found Adams to be a credible, though confusing, witness. Although Bermas appeared to be testifying in an honest and truthful manner, as there is a clear conflict between his testimony and that of Mundo and Adams, I credit Mundo and Adams, principally because I find that Rattner would not give her negotiator the necessary authority to enter agreements with the Union about the grievances. *National Amusements*, 155 NLRB 1200 at 1206 (1965), states:

> Respondent's duty to bargain included the obligation to appoint a negotiator with real authority to negotiate and a willingness to meet at reasonable times and places. The law requires an employer to apply himself to collective bargaining sessions with the same degree of diligence and promptness as he does in his other important business interests, and his reluctance or apparent disinterest in this area or his failure to appoint an agent to negotiate fundamental issues is evidence of lack of good faith in the bargaining process.

In *Carpenters Local 1780*, 244 NLRB 277 at 281 (1979), the Board stated: ''While Respondent is not required to be represented by an individual with final authority to enter into an agreement, this privilege is subject to the proviso that such limitation does not act to inhibit the progress of negotiations.'' Although these cases speak of negotiations rather than grievance meetings, as is present here, the rule is the same as good-faith collective bargaining extends to grievance discussions. It is a waste of time for both sides, if the parties meet to attempt to resolve grievances, but the representative of one side has no authority to do so. Because I find that the failure to give her representative the authority to properly act at grievance meetings is consistent with Rattner's general attitude here, I credit Adams and Mundo and find that Respondent violated Section 8(a)(1) and (5) of the Act.

It is next alleged that Respondent discharged Arias on about July 7 and did not reinstate him until on about July 16, and discharged him again on about August 27 and did not reinstate him until about July 18, 1994, in order to prevent him from becoming a member of the Union pursuant to the union-security clause of its contract with the Union in violation of the Act. Although the record is unclear whether Arias worked continuously between about June 4 and August 27, or whether he was discharged on about July 7, was rehired about 10 days later, and was finally terminated on about August 27, I credit the testimony of Murray that Arias was fired on about August 27 to prevent him from becoming a member of the Union. This finding is supported by the lack of any other reason for his termination; there was no evidence that he was anything other than a good employee, as Murray testified, and he generally worked full 40-hour weeks during the period of his employ. I therefore find that by discharging Arias on about August 27, Respondent violated Section 8(a)(1) and (3) of the Act. There is a similar allegation regarding Sossinski. It is alleged that in about October or November, Respondent discharged Sossinski to prevent him from becoming a member of the Union. The testimony establishes that at a meeting on November 17, the Union informed Murray that Sossinski had in excess of 60 days of employment with Respondent (he had been employed for 30 days in July and August, and was rehired on October 4) and that he therefore had to become a member of the Union. When Murray informed Rattner of this situation, she directed him to fire Sossinski to prevent him from joining the Union, which he did on November 19. The timing was right, there is no lack of animus, and Respondent presented no defense to this discharge, other than Rattner's unsupported testimony that he was fired because he did not produce the required I-9 documentation. I find that this discharge on November 19 violates Section 8(a)(1) and (3) of the Act.

The next allegation is that Respondent imposed less desirable and more onerous working conditions on Meyers, by assigning him to clean the fourth floor bathroom at the facility in about June or July, and the first floor bathroom during the week of October 25, and by assigning him to work overtime in about October. As stated above, Meyers had been employed at the facility for 10 years and had been the shop steward at the facility for 3 or 4 years. Meyers testified that he was given this bathroom assignment in about June after he accompanied an OSHA agent to inspect the facility on the basis of a complaint that had been filed with OSHA. When he returned, Murray told him that he had to clean the fourth floor bathroom at the facility. In his 10 years of employment with Respondent, he had never previously performed this work, and the employee who did it was still employed. Murray testified that Meyers had filed grievances about the condition of the bathrooms, and Rattner told him to assign Meyers to clean it to solve the grievance. The difference between their testimony is not surprising as a year had passed since the incident occurred, and Meyers and Murray could have confused a grievance with an OSHA inspection. Further, Respondent presented no evidence to establish why Meyers was given this assignment. I find that the evidence establishes that Meyers was given the assignment in retaliation for his union activities in violation of Section 8(a)(1) and (3) of the Act. As the evidence establishes that Meyers continued to clean the bathroom until December 22, I find it unnecessary to determine whether he was unlawfully assigned to clean a different bathroom in October. In October, Meyers had some

grievances in his hand preparing to give them to Murray or Rattner. When he met Rattner at about 4:15 p.m., she asked what he had in his hand and he said that they were grievances that he was going to give to her. She told him to wait until after work, which he did, and gave them to Murray about 5 minutes later. A few minutes later Murray told him that he had to work overtime that day. The overtime was mandatory and he had not previously been assigned to overtime work. Murray testified that he knew that Meyers did not like overtime work and he assigned this work to Meyers, on orders from Rattner, because Meyers had filed the grievances as the shop steward. As Meyers was ordered to perform the overtime work in retaliation for his filing grievances as the union shop steward, this also violates Section 8(a)(1) and (3) of the Act.

It is next alleged that in June or July Respondent suspended Aponte for 3 days without pay, in about July, issued Aponte a written warning and transferred him from his position in its batch making department to its paint filling department, issued him a written warning on about October 5, and on about October 25 suspended him for 3 days without pay and assigned him to clean the second floor bathroom at the facility. Aponte received a written warning dated June 23 stating: ''Employee has been warned numerous times . . . concerning not wearing proper safety equipment—Employee is now being suspended for three days.'' Murray testified that Aponte was given this warning because Respondent wanted to make an example of him because of his union activities; however, he was not present at the time that Aponte was allegedly not wearing his goggles on June 23. Additionally, Murray also testified that Aponte did not become a part of the union committee until July or August, and there is no evidence of any earlier union activities on the part of Aponte. The convincing evidence fails to establish any union activity on Aponte's part until after this warning. Considering Aponte's prior warnings and the lack of proof that it was his union activities that caused this June 23 warning (it may have been that Rattner just didn't like Aponte, as Murray testified), I recommend that this allegation be dismissed. I would also recommend that the allegations regarding the warning that he received on July 21, and the subsequent transfer to the paint filling department be dismissed. As stated above, Aponte had received other prior warnings and there is a lack of convincing evidence of union activities on his part at that time. Although there is substantial evidence of animus on the part of Respondent, that does not mean that all discipline that it metes out violates the Act. That is especially so in this situation, where the boss sees an employee at his work station with a union sign. It was not unreasonable to assume that he made it during his working time.

Aponte received written warning on October 5 for ''not working'' and ''conduct'' and a warning on October 25 for ''disobedience'' stating: ''As a result of numerous warnings, verbal and written, concerning not working as assigned, and conversing instead of working, employee is suspended for three days.'' In addition, on about October 25 he was assigned to clean the second floor bathroom. By this time, Aponte's position with the union committee was known to Respondent. In addition, unlike the prior warnings, Rattner's contemporaneous comments to Aponte connect the warnings to his union activities. When she told Aponte about the October 5 warning, she told him to tell the Union about it. I therefore find that this warning violates Section 8(a)(1) and (3) of the Act. As there is no direct evidence that this October 25 warning and suspension were caused by his union position and activities (and Rattner was not very circumspect in her feelings toward the Union and its supporters) I would recommend that this allegation be dismissed. Although there is also no direct evidence connecting the bathroom cleaning assignment to his union activities, there are two factors that convince me that it was in retaliation for his union activities. His union activities were now known to Respondent, and he and Meyers had never previously been assigned to clean the bathroom at the facility. Two union committeemen receiving assignments to clean bathrooms is too much to be considered a coincidence. I therefore find that this assignment violated Section 8(a)(1) and (3) of the Act.

The next allegations to be discussed involved alleged violations of Section 8(a)(1) and (5) of the Act. It is alleged that on about October 15, Respondent changed the frequency for which its employees were paid from weekly to biweekly. On October 15, Respondent notified its employees that beginning the following week, they would no longer be paid weekly; rather, they would be paid every other week. There was no prior negotiation or notification to the Union. This biweekly pay system lasted through December. The frequency that employees are paid is a mandatory subject of bargaining. *King Radio Corp*., 166 NLRB 649, 654 (1967); *Sommerville Mills*, 308 NLRB 425 at 439 (1992). Respondent made this change without first contacting, or bargaining with, the Union. It therefore violated Section 8(a)(1) and (5) of the Act.

The next allegation in this category is that on about October 26, November 17, and December 1, Respondent denied the Union access to the facility, even though the contract between the parties provides for such access in violation of Section 8(a)(1) and (5) of the Act. Article 23 of the contract provides:

> A duly authorized representative of the Union shall be permitted access to the factory of the Employer upon condition that he shall before entering the factory, make application therefor to the Employer, and upon further condition that he shall not during such visits interfere with production in the factory.

The uncontradicted testimony of Adams and Murray is that prior to October there were no restrictions on the right of the Union to visit the facility. They just showed up and walked in. In about October, Rattner told Murray that she interpreted the contract to mean that the Union had to make prior application to visit the facility, and if the Union ''was holding us to the contract, we're going to hold them to the contract.'' Actually, she did more than that, she refused to allow the Union to visit the facility on about October 27, November 29, and December 1. Mundo testified that one reason for the Union's request to visit the facility was to determine whether to file exceptions to OSHA's findings at the facility. By unilaterally changing the practice allowing the Union to visit the facility, as set forth in its contract, Respondent violated Section 8(a)(1) and (5) of the Act. *Harvey's Wagon Wheel*, 236 NLRB 1670 (1978); *15th Avenue Iron Works*, 301 NLRB 878 (1991).

The next allegations allege that Respondent refused to provide certain information to the Union in violation of Section

8(a)(1) and (5) of the Act. These information requests cover three different areas; by requests on November 29 and December 15, the Union requested information on the cost and type of medical insurance coverage provided by Respondent, information allegedly needed for the contract reopener on that subject; by request of December 1 and 15, the Union requested a list of all current employees, job titles, and hourly pay, which was needed to investigate whether all employees were joining the Union after 60 days of employment, as required by the contract; and on December 1 and 15 the Union requested that the Respondent furnish it with its books and records to substantiate its alleged inability to afford a wage increase in the wage reopener negotiations. The law is clear that an employer must provide a union with requested information where there is a probability that the information would be relevant to the union in fulfilling its statutory duties as the bargaining representative of the employer's employees. When the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. Where the information does not concern matters pertaining to the bargaining unit, the union must show that the information is relevant. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *Trustees of the Masonic Hall*, 261 NLRB 436 (1982). The contract contained a clause allowing the Union or Respondent to reopen the contract on December 1 on the subjects of wages and medical coverage, and the Union properly exercised this right to reopen. There can be no question that the Union was entitled to the medical insurance information requested in its November 29 letter. This information was necessary for the Union to intelligently negotiate about this subject. I cannot understand the testimony of Bermas, an otherwise articulate witness, that because the Union had made no information request a year earlier when the Respondent reduced medical benefits, he ''just didn't see why any cost information was appropriate'' in 1993. I therefore find that Respondent's failure to provide the Union with the medical coverage information requested on November 29 violated Section 8(a)(1) and (5) of the Act.

On December 1, the Union requested that Respondent provide it with a list of all current employees, their job titles, and salaries. The list that Respondent provided gave only the union members with their salaries. That, obviously, missed the point. The Union suspected that Respondent was employing people at the facility who should have been in the Union, but were not. These suspicions were not without substance; 2 weeks earlier, when the Union told Murray that Sossinski had been employed long enough to be in the Union, Murray said that if that were true he would be terminated. A list of all employees (not union members) employed at the facility was clearly relevant to the Union in determining whether the union-security clause of the contract was being followed. By refusing to provide the Union with this information, the Respondent violated Section 8(a)(1) and (5) of the Act. *Duquesne Light Co.*, 306 NLRB 1042 (1992). The final allegation in this area is that Respondent refused to turn over its books and records to the Union after claiming that Respondent could not afford to pay an increase to its employees. When an employer alleges an inability to pay as a defense against a proposed wage increase, it must substantiate that claim if the union demands to see its books and records. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956). As the Union requested this information at the meetings on December 1 and 15, and Respondent never provided it with the information, the only issue is whether Respondent, at these meetings, said that it could not afford a wage increase. I found Bermas' testimony very convincing on this subject. As stated above, I found him to be a very articulate and sometimes convincing witness. He testified that he knew enough about labor law to understand the difference between saying that you could not afford an increase (where you have to turn over your books and records) and saying that you could not do it for competitive reasons (without the need to turn over the books and records), and that makes sense. I do not credit Mundo's testimony that at the December 1 meeting Bermas, on three occasions, stated that Respondent could not afford a wage increase. While Bermas may not have been an expert in the field of labor law, he was clearly not so stupid and gullible as to respond as Mundo testified that he did. I therefore find that Respondent never alleged an inability to pay at the December 1 and 15 meetings, and therefore was not under an obligation to turn over its books and records to the Union. I therefore recommend that this allegation be dismissed.

Finally, the complaint alleges that since about June 1 Respondent has failed to remit to the Union all dues and initiation fees which it deducted from its employees wages in violation of Section 8(a)(1) and (5) of the Act. There was no evidence to support this allegation. In fact, the only evidence adduced on this subject was that the Union did not possess checkoff authorization forms from its members. In addition, the General Counsel's brief does not address this issue, and I recommend that this allegation be dismissed.

The remaining allegations relate to the events of December 22 and the subsequent events. It is alleged that on that day the Respondent discharged all the unit employees at the facility (with the exception of the six who were told to report for work on December 27) because they engaged in concerted activities of demanding the full 2 weeks' pay owed to them. Respondent defends that the following week was historically a slow week warranting large layoffs, and that was the reason that they were told not to come in until further notice. The employees' testimony on this subject was especially credible. Cerezo, who had been employed by Respondent for 17 years, testified that, in the past, employees' workweeks were cut to 32 hours, but it was usually done by seniority and the employees were given 2 days' notice of the change. Aponte, who had been employed at the facility for 7 years, testified that he was laid off in the past, but he was notified days in advance of the layoff and was given the option of using vacation days or sick leave during the layoff. Bruno testified that 3 or 4 years earlier there had been a layoff without any advance warning, but because of his seniority (17 years at the facility) he was not laid off. Murray also testified that, in the past, employees were given advance warning of layoffs and were given an opportunity to use vacation time or sick leave during that period. I find that the overwhelming credible evidence establishes that these employees were told not to return to work on December 27 because of their protected activities on December 22. We start with the incredible amount of union animus displayed by Rattner over the prior 6 months. Additionally, the employees were not told of the layoff until about 6 p.m. that day, after they had concertedly protested the fact that they were not paid in full;

until that time, Murray had not been told of the layoff. Further proof that this was discriminatorily motivated is that the employees were not given an opportunity to use sick leave and vacation leave during this period, and that the layoffs were not chosen by seniority or superseniority, as provided by the contract. Murray testified credibly that work would be slow the following week and that even with some additional employees needed for the inventory, some layoffs would be required. I find however that the number of those being laid off and Rattner's choices for layoff were selected discriminatorily, and that the layoff of these employees on December 22 violated Section 8(a)(1) and (3) of the Act. The fact that some layoffs would have occurred regardless is a factor to be considered in the supplemental hearing here.

Bruno was originally one of the six employees chosen by Rattner to work the following week. It is alleged that because he protested the amount of his check and vacation pay, Rattner changed her mind and said that he could not work the following week. Bruno and Murray testified to that effect; Rattner testified that she smelled liquor on his breath and decided that it was not a good idea to bring him back. Although it is true that Mercado questioned Rattner about his vacation pay before Bruno, without retribution, it appears from Murray's credible testimony that Bruno was more persistent, which may explain Rattner's reaction. I therefore find that Rattner laid him off on December 22 because of his protected concerted activities in violation of Section 8(a)(1) of the Act.

It is next alleged that on December 27, Respondent discharged the six employees (less Bruno who was laid off after he protested his pay on December 22) who were scheduled to work on December 27.[5] The General Counsel's brief alleges that ''it should be found that Respondent discharged these six employees on January 3, when it stopped asking for any employees to report for work, for their concerted activities.'' Rather, the evidence establishes that, by letter dated December 30, Respondent requested that the six employees (less Bruno and plus four others, nine in total) report for work on Monday, January 3, 1994. The evidence further establishes that the employees banded together, agreeing that none would work unless they all worked, and that was the reason that these six employees did not work. They were never terminated by Respondent. I therefore recommend that this allegation be dismissed.

Beginning on about January 3, 1994, the Union established a picket line at the facility. The complaint alleges that from December 27 to about February 1, 1994, these employees ceased work concertedly and engaged in a strike that was caused by Respondent's unfair labor practices. The complaint further alleges that by oral communication and letter of its attorney on February 11 and 12, the Union made an unconditional offer for the employees to return to work.

In *Typoservice Corp.*, 203 NLRB 1180 (1973), the Board stated: ''An unfair labor practice strike does not result merely because the strike follows the unfair labor practice. A causal connection between the two events must be established.'' *National Fresh Fruit & Vegetable Co.*, 227 NLRB 2014 at 2017 (1977), stated: ''It is well established by Board and court precedent that a strike is an unfair labor practice strike if only one cause, even if not the primary cause, was the employer's unfair labor practice, notwithstanding the presence of economic issues.'' *Tufts Bros., Inc.*, 235 NLRB 808 at 810 (1978), stated:

> An unfair labor practice strike is one which is caused in whole or in part by an unfair labor practice. The requirement of a causal connection between the unfair labor practice and the strike is not satisfied merely because the two coincide in time. It is necessary for the Board to find that Respondent's unlawful conduct in fact constituted a contributing cause to the strike that followed.

The connection between the strike and the unfair labor practices here is unmistakable. It is unnecessary to discuss Respondent's pre-December 22 unfair labor practices because the unfair labor practices of that day was the immediate cause of the strike. The evidence is clear that the employees concertedly engaged in the work stoppage beginning on December 27 because Respondent had unlawfully laid off all but six of the employees. Protesting that none will work unless all work is a layman's way of protesting a layoff (found unlawful). I therefore find that commencing December 27, employees of Respondent engaged in a strike protesting Respondent's unfair labor practices.

Mundo's letter to Respondent of January 12, 1994, states that ''the employees will return to work provided that all employees are allowed to return to work,'' that the Employer will not take any action against any employee regarding the events of December 22, and the Union and the employees reserved their rights to take any action before the courts, the Board, or the grievance machinery of the contract: ''The return to work of any employee is not deemed a waiver of any such rights.'' Respondent denies that this was an unconditional offer to return to work. In his cross-examination of Mundo, counsel for Respondent stressed that Mundo's letter stated that *all* would return when, 10 days earlier, Richman had written that Respondent had work for nine named employees. In his brief, counsel for Respondent alleges that the letter was not an unconditional offer to return to work because it was an inaccurate recapitulation of his earlier conversations with Richman. The brief states:

> There was nothing in Mundo's conversation with Richman relating to the continuation or non-continuation of the NLRB charges. Respondent submits that Rattner did not want to inadvertently waive or concede rights that she might have had without first ascertaining what the paragraphs meant. In denying that the statements set forth in paragraphs 4, 5, 6, 7 and 8 were made, she did not reject an unconditional offer; she was just setting the record straight.

Although it is not entirely clear from this statement, I will assume that Respondent is alleging that the offer was not an unconditional offer to return because it reserved the rights of the employees to take whatever legal action that was available to them and because it stated that all the employees

[5] The record is unclear who, other than Bruno, these six employees are. In addition, the complaint and the General Counsel's brief are not always consistent on this subject. I therefore leave this determination to the supplemental hearing.

would return.[6] As regards the Union's reservation of its rights, clearly this does not convert an otherwise unconditional offer into a conditional offer. These rights exist by statute, and the Union would have had these rights even if it were not so specified in the letter. Additionally, if Rattner had specifically demanded that the employees give up these rights in order to be reinstated, it would probably constitute a violation of the Act.

More difficult is the question whether because the January 12, 1994 letter states that ''[t]he employees will return to work provided that all employees are allowed to return to work'' converts this letter into a conditional offer to return to work. I find that it does not. Because they were engaged in an unfair labor practice strike and none of them engaged in conduct so serious as to deprive them of reinstatement, all the employees were entitled to reinstatement. *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987). If Respondent had a question as to this portion of the offer to return, it should have advised Mundo and sought clarification of his position. It did not do so, and I find that this January 12, 1994 letter constituted an unconditional offer to return to work. *Woodlawn Hospital*, 233 NLRB 782 (1977); *Columbia Portland Cement Co*., 303 NLRB 880 (1991). I therefore find that backpay begins to accumulate for all the employees, including the six who were not laid off on December 22, on January 17, 1994, 5 days after this unconditional offer to return. *Drug Package Co*., 228 NLRB 108 (1977).

February 1, 1994, was a day in which many events occurred within a short period of time at the facility. On that day, the employees reported for work, for the first time since December 22. Under normal circumstances this would have been a difficult time for Respondent with about 18 employees reporting for work after being out for more than a month, and with Murray, the plant manager, no longer employed at the facility. It is alleged that Rattner's activities that morning made a difficult situation chaotic. It is first alleged that on that day Respondent required its employees at the facility to change into their work clothes in the bathroom, contrary to prior procedure, in violation of the Act. The evidence establishes that when Rattner spoke to the employees on that day, she told them that they would have to change into their work clothes (in the morning, and back into their street clothes in the afternoon) in the bathroom at the facility. This was a change from their past practice, and had not been previously discussed with the Union. Rattner testified generally about changes in the areas that Respondent rented and it may be that these changes resulted in the loss of the employees' changing room. *If that were so,* Respondent could have discussed it with the Union to work out alternative plans. Respondent failed to do so. Although, at first glance, this may seem to be an inconsequential matter, for the employees who have to change twice a day, this affects their terms and conditions of employment. It is a mandatory subject and, as Respondent introduced this change without prior notice to, or bargaining with, the Union, it violates Section 8(a)(1) and (5) of the Act. It is also alleged that by assigning Cerezo to be in charge of the employees' changing in the bathroom, Respondent violated Section 8(a)(1) and (3) of the Act. Respondent never explained why Cerezo (or any employee) was needed to be in charge of the employees' changing in and out of their work clothes. Considering Rattner's union animus throughout this period, and on February 1, 1994, in particular, I find that it was done to punish Cerezo for his support for the Union and his position with the Union. I therefore find that it violates Section 8(a)(1) and (3) of the Act.

The next allegation involves Rattner's assignment to Meyers and Cerezo to move the heavy paint cans. As the employees had been away for over a month, obviously, much was to be done before the facility would be operating at full capacity. It is also obvious that in a situation such as this, employees, initially, have to expect changes in assignments, at least, until the facility is operating smoothly. That, however, does not explain Rattner's assignment of Meyers and Cerezo to separate the paint cans by regular stock and specials. Even if that were a worthwhile cause, it seems more reasonable to get the facility operating smoothly first, and then assign employees to move the cans. The other unanswered question is why Rattner chose Meyers and Cerezo, the union steward and assistant steward, from all its employees, to perform this work. Considering the clear union animus here, I have no difficulty in finding that they were chosen because of their union positions. Although the evidence establishes that Rattner sent Meyers and Karras to get a handtruck, before they returned, she assigned Cerezo to carry a 50-pound can of paint without a handtruck for no apparent reason, and I therefore find that these assignments violated Section 8(a)(1) and (3) of the Act.

It is next alleged that Respondent violated the Act by subjecting Meyers to closer than normal supervision and by following him. In this regard, I found Rattner's testimony reasonable and logical. The employees were leaving, and Meyers was going upstairs instead of downstairs. With feelings inflamed, as they must have been, it was not unreasonable for her to look to see where he was going. I therefore recommend that this allegation be dismissed. It is further alleged that Respondent violated the Act by requiring Meyers to put his clothes in a locked room. As I find no evidence to support this allegation, I recommend that it be dismissed. It is also alleged that during this incident, Rattner interrogated an employee about his support for the Union. Cerezo's credible evidence establishes that as the employees were preparing to leave the facility, Rattner asked Gonzales: ''Are you staying with me or are you with the Union?'' Gonzales said that he was a union member and was leaving. *Rossmore House*, 269 NLRB 1176 (1984), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), provide that in interrogation situations such as this, the administrative law judge and the Board must look at all the circumstances to determine whether the interrogation was coercive and violated Section 8(a)(1) of the Act. Facts to look at include the background and surrounding circumstances, who was the questioner and who was questioned and whether he/she was an active and open union supporter, and the place and method of interrogation. In the instant situation, Rattner had displayed union animus and committed numerous violations of the Act over the prior 8 months. She was the boss and had just ''fired'' all the em-

[6] Whereas Rattner's fax to Mundo dated January 12, 1994, states that she never agreed to the statements contained in pars. 4, 5, 6, 7, and 8 of his January 12, 1994 fax, it is par. 3 where Mundo states that the employees will return provided that all are allowed to return. Because par. 8 of Mundo's fax however simply states the name of the union agent to contact if she has any questions, I assume that Rattner misnumbered the paragraphs and was objecting to this provision in par. 3.

ployees for the second time in about 5 weeks. Under these circumstances, the interrogation reasonable tended to coerce Gonzales, and it therefore violates Section 8(a)(1) of the Act. In this regard, it is also alleged that Rattner pulled Cerezo by his jacket in violation of the Act. Although I credit the testimony of Cerezo that during the final encounter with Rattner on February 1, 1994, she pulled on his jacket, I find that under the circumstances here that would not have a tendency to coerce him, and I recommend that this allegation be dismissed.

The final allegation here is that Rattner concluded the events and workday of February 1, 1994, by directing its employees to leave the facility and locked them out from that day until about March 8, 1994, in violation of Section 8(a)(1), (3), and (5) of the Act. The credible evidence supports this allegation. Rattner committed numerous violations on and prior to December 22, resulting in an unfair labor practice strike by her employees and they picketed the facility from about January 3, 1994. As evidenced by her actions at the January 5, 1994 meeting, she was not pleasantly disposed toward the Union. When she was called on February 1, 1994, and told that the employees had returned, without advance warning, she was obviously more annoyed at the employees, and showed it beginning about a half hour later when she arrived at the facility. As found above, she committed numerous violations in the short period that she was at the facility. As an example, when Cerezo complained about being forced to carry a 50-pound can of paint for no apparent reason, she responded that if you work for her, you do as you are told. When Aponte claimed that she was harassing them, she said that either the employees worked with her or they should get out. When Aponte asked her what she meant, she said, ''Get out of my factory.'' She also told the employees that they should spend some more time walking in the snow, as they had before, and they left. Clearly, the employees had done nothing to warrant being terminated, other than supporting the Union and engaging in an unfair labor practice strike from December 27 to February 1, 1994, and it was these activities and her dislike for the Union which caused Rattner to direct her employees to leave and to lock them out until about March 8, 1994, in violation of Section 8(a)(1) and (3) of the Act. The complaint also alleges that because the contract contains a no-strike, no-lockout clause, this lockout violates Section 8(a)(1) and (5) as well, and I agree.

At the hearing and in his brief, counsel for Respondent argues that the issues here should be deferred to the contractual grievance procedure under *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp*., 268 NLRB 557 (1984). The General Counsel defends in two areas. One, that it is never appropriate to defer breach of access and failure to provide information cases, which are included here and, as regards the remainder of the case, because of the ''egregious violations'' here, deferral would be inappropriate. The grievance provision in the contract covers ''Any controversy, claim or dispute or grievance of any nature whatsoever arising between the employer and the Union or any employees.''

In the long history of deferral cases, principally lead by *Collyer*, supra, a number of factors had to be present in order for the Board to defer its jurisdiction to the grievance-arbitration machinery of the parties' contract: that the arbitration clause clearly encompassed the dispute at hand, the employer was willing to utilize the arbitration procedure to resolve the dispute, and the dispute arose within the confines of a long and productive collective-bargaining relationship and there was no claim of employer animosity to the employees' exercise of protected rights. Put in another way, whether the employer's conduct ''constitutes a rejection of the principles of collective bargaining'' as was stated in the dissenting opinion in *General American Transportation*, 228 NLRB 808 (1977). In *United Aircraft Corp*., 204 NLRB 879 (1973), the Board stated:

> We continue to believe that an exploration of the nature of the relationship between the parties is relevant to the question of whether in a particular case we ought or ought not defer contractually resolvable issues to the parties own machinery. Where the facts show a sufficient degree of hostility, either on the facts of the case at bar alone or in the light of prior unlawful conduct of which the immediate dispute may fairly be said to be simply a continuation, there is serious reason to question whether we ought defer to arbitration.

The instant matter presents a classic situation of an employer who, during the period in question, rejected the collective-bargaining process. I have found, inter alia, that beginning in June, Rattner appointed Bermas to represent Respondent in grievance meetings without giving him the proper authority to act and disciplined the shop steward and assistant shop steward for attempting to attend the June 16 meeting, fired employees rather than let them join the Union as provided in the union-security clause of its contract with the Union, discriminated against its shop steward and assistant shop steward for their actions in those capacities, refused to provide the Union with requested and relevant information, and refused to provide the Union with access to its facility. All these found violations illustrate a rejection of the collective-bargaining process. As for its activities involving *Meyers* and *Cerezo*, the Board in *Joseph T. Ryerson & Sons, Inc*., 199 NLRB 461 at 462 (1972), stated that a threat of reprisal for engaging in union activities:

> strikes at the foundation of that grievance and arbitration mechanism upon which we have relied in the formulation of our *Collyer* doctrine. If we are to foster the national policy favoring collective bargaining and arbitration as a primary arena for the resolution of industrial disputes, as we sought to do in *Collyer*, by declining to intervene in disputes best settled elsewhere, we must assure ourselves that those alternative procedures are not only ''fair and regular'' but that they are or were open, in fact, for use by the disputants.

The evidence establishes that for the period of June through February 1994, Respondent rejected most aspects of collective bargaining with the Union by not engaging in meaningful grievance meetings, not turning over relevant documents to the Union, not allowing it access to the facility, discriminating against its representatives at the facility, and more. It appears that Rattner's principle purpose during this period was to get rid of the Union and its supporters. In this situation, deferral to the contract's grievance-and-arbitration procedure is not warranted.

CONCLUSIONS OF LAW

1. Respondent Paragon Paint & Varnish Corporation has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent in its plant located at 5–49 46th Avenue, Long Island City, New York, including working foremen, and excluding salesmen, chemists, laboratory assistants, clerical office employees, guards and supervisors as defined in the Act.

4. At all material times, the Union and/or Local 406 has been the collective-bargaining representative of the employees described above.

5. Respondent violated Section 8(a)(1) of the Act in the following manner:

(a) Interrogating its employees about their support for the Union.

(b) Imposing more onerous and less desirable working conditions on its employees because they engaged in a concerted protest and strike commencing on December 22 and other protected concerted actions.

6. Respondent violated Section 8(a)(1) and (3) of the Act in the following manner:

(a) Issuing warnings to its employees.

(b) Imposing more onerous and less desirable working conditions on its employees.

(c) Discharging its employees Arias, Sossinski, and subsequently all but six of its employees.

(d) Suspending its employees.

(e) Forcing employees to work overtime.

(e) Requiring its employees to use the bathroom to change into their work clothes.

(f) Refusing to reinstatement its employees after they made an unconditional offer to return to work on January 12, 1994.

(g) Locking out its employees on about February 1, 1994.

7. Respondent violated Section 8(a)(1) and (5) in the following manner:

(a) Failing to give its attorney the required authority with which to bargain with the Union about grievances.

(b) Reducing the frequency with which it paid its employees without prior negotiations with the Union.

(c) Unilaterally refusing to grant the Union access to the facility.

(d) Failing to provide the Union with information that it requested regarding the medical insurance that it provided and the employees that it employed.

(e) Requiring its employees to use the bathroom to change in and out of their work clothes.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully discharged Arias and Sossinski, I shall recommend that Respondent be ordered to offer them immediate reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, to make them whole for the loss they suffered, and to expunge from its files any reference to these terminations. I have also found that Respondent unlawfully laid off all but about six of its employees on December 27. It is clear that Meyers, Cerezo, Aponte, and Bruno are 4 of the approximately 12 who were unlawfully laid off at that time. I leave it for the supplemental hearing the identity of the others. The backpay of these employees begins on that day and runs until about March 8, 1994, when they were apparently reinstated to their former positions of employment. As the Union made an unconditional offer of reinstatement for all its members on January 12, 1994, the backpay for the approximately six remaining employees commences on January 17, 1994, and also runs to March 8, 1994, when they were apparently reinstated. It is recommended that Respondent make each of these groups of employees whole for the loss they suffered due to the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolwoth*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1986).

[Recommended Order omitted from publication.]